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PREFACE.

THE statutes relating to Real Estate, which were passed during the years 1874—1877, made considerable alterations in the law, not only by the enactment of entirely new provisions, but also by the amendment of previously existing statutes.

The main object of the following pages is to show clearly the effect of the recent legislation by giving such of the provisions of the amended statutes as are still in force, and the provisions of the more recent statutes in a consolidated form. A similar plan has been adopted by the Legislature in the Settled Estates Act, 1877.

The Land Transfer Act has hitherto had so little effect on general practice that it has been omitted, with the exception of the two sections which amend the Vendor and Purchaser Act, 1874. The Improvement of Land Act, 1864, has also been omitted, although it is to be read with the Limited

Owners' Reservoirs and Water Supply Further Facilities Act which is printed in full.

The author has ventured to re-write the marginal notes to some of the statutes.

The book, as originally projected, was intended principally for the use of students; but the author has endeavoured to give the result of the decided cases in such a form as also to be of service to the profession generally.

As a rule, only one reference to the full report of each case has been given, together with a reference to the analysis of the same case in "Notanda," where other references will be found.

The cases are brought down to the Long Vacation, 1878.

H. G.

2, Old Square,
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LIST OF ABBREVIATIONS.

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A. & E. / Ad. & El.	Adolphus and Ellis's Reports.
Amb.	Ambler's Reports.
Ap. Cas.	Law Reports (present series) Appeal Cases.
Atk.	Atkyns' Reports.
B.	Beavan's Reports.
B. & Ad.	Barnwall and Adolphus' Reports.
B. & Al.	Barnwall and Alderson's Reports.
B. & C.	Barnwall and Cresswell's Reports.
Ban. Lim.	Banning on the Limitation of Actions.
Beat.	Beatty's Cases in Chancery.
Bing.	Bingham's Reports.
Bing. N. C.	Bingham's New Cases.
Bli. N. R.	Bligh's New Reports.
Bro. C. C.	Brown's Chancery Cases.
Br. Lim.	Brown on the Statutes of Limitation.
Burton, R. P.	Burton on the Law of Real Property.
Car. & Kir.	Carrington and Kirwan's Reports.
Ch. D.	Law Reports (present series) Chancery Division.
Cl. & F.	Clark and Finelly's Reports.
Col. / C. C. C.	Collyer's Chancery Cases.
C. B.	Common Bench Reports.
C. B. (N. S.)	,, ,, ,, (New Series).
C. & M.	Crompton and Meeson's Reports.
C. & P.	Carrington and Payne's Reports.
Con. & Law.	Connor and Lawson's Reports.
Cons. Ord.	Consolidated Orders.
Cop. Tit. Deeds	Copinger on Title Deeds.
Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports.
Darb. & Bos. Lim.	Darby & Bosanquet on the Statutes of Limitation.
Dart V. & P.	Dart on Vendors and Purchasers.
Dav. / Dav. Conv.	Davidson's Precedents in Conveyancing.
De G. F. & J. / D. F. J.	De Gex, Fisher, and Jones' Reports.
De G. & J.	De Gex and Jones' Reports.
De G. J. & S. / D. J. & S.	De Gex, Jones, and Smith's Reports.
D. M. G.	De Gex, Macnaghten, and Gordon's Reports.

De G. & S.	De Gex and Smale's Reports.
Dow.	Dow's Reports.
Dow. & Low.	Dowling and Lowndes' Reports.
Drew.	Drewry's Reports.
Dr. & S.	Drewry and Smale's Reports.
D. & Wal.	Drury and Walsh's Reports.
Dr. & War. / Dru. & War.	Drury and Warren's Reports.
East	East's Reports.
El. & Bl. / E. & Bl.	Ellis and Blackburn's Reports.
El. & El.	Ellis and Ellis's Reports.
Ex.	Exchequer Reports (Welsby, Hurlstone, and Gordon).
Fearne, C. R.	Fearne on Contingent Remainders.
F. & F.	Foster and Finlason's Reports.
Giff.	Giffard's Reports.
H.	Hare's Reports.
Hayes	Hayes' Reports.
H. & M.	Hemming and Miller's Reports.
H. L. C. / H. L.	House of Lords Cases.
H. & N.	Hurlstone and Norman's Reports.
I. Ch. R.	Irish Chancery Reports.
I. C. L. R.	Irish Common Law Reports.
I. Eq. R.	Irish Equity Reports.
I. L. R.	Irish Law Reports.
I. R. C. L.	Irish Reports—Common Law.
I. R. Eq.	Irish Reports—Equity.
Jac. & W.	Jacob and Walker's Reports.
Jeb. & Sq.	Jebb and Symes's Reports.
J. & H.	Johnson and Hemming's Reports.
Joh.	Johnson's Reports.
J. & La T. / Jo. & La T.	Jones and La Touche's Reports.
Jur.	The Jurist Reports.
Jur. (N. S.)	,, (New Series).
K.	Kay's Reports.
K. & J.	Kay and Johnson's Reports.
Keen	Keen's Reports.
L. J.	Law Journal Reports.
L. J. (N. S.)	Law Journal Reports (New Series).
L. R. Ch.	Law Reports (1865—1875), Chancery Appeals.
L. R. C. P.	,, (1865—1875), Common Pleas Cases.
L. R. Eq.	,, (1865—1875), Equity Cases.
L. R. Ex.	,, (1865—1875), Exchequer Cases.
L. R. H. L.	,, (1865—1875), English and Irish Appeals.
L. R. P. C.	,, (1865—1875), Privy Council Appeals.
L. R. Q. B.	,, (1865—1875), Queen's Bench Cases.
L. T.	Law Times Reports.
L. T. (N. S.)	,, (New Series).
L. & T. / Long. & Town.	Longfield and Townsend's Reports.
M. & G.	Macnaghten and Gordon's Reports.
Man. & G.	Manning and Grainger's Reports.
M. & W.	Meeson and Welsby's Reports.
M. & C.	Mylne and Craig's Reports.
M. & K.	Mylne and Keen's Reports.

Mer.	Merivale's Reports.
Moo.	Moore's Reports.
Moo. & P.	Moore and Payne's Reports.
M. P. C. C.	Moore's Privy Council Cases.
N. R.	New Reports.
1 Not.	Notanda—(Old Series).
2 Not.	,, (Second Series).
3 Not.	,, (Third Series).
4 Not.	,, (Fourth Series).
Peake N. P. C.	Peake's Cases at Nisi Prius.
Phil.	Phillips' Chancery Cases.
Phil. C. C.	Phillips' Chancery Cases.
Price	Price's Reports.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series).
Q. B. D.	Law Reports (present series), Queen's Bench Division.
Reg.	Judges' Regulations under Consolidated Orders.
Rus.	Russell's Reports.
R. S. C.	Rules of the Supreme Court, 1875.
Sch. & Lef.	Schoales and Lefroy's Reports.
Sim.	Simon's Reports.
Sim. (N. S.)	Simon's Reports (New Series).
Sim. & Stu.	Simon and Stuart's Reports.
Sm. L. C.	Smith's Leading Cases.
Sugd. R. P.	Sugden (Lord St. Leonards) on Real Property Statutes.
Sugd. V. & P.	Sugden (Lord St. Leonards) on Vendors and Purchasers.
Taunt.	Taunton's Reports.
T. R.	Term Reports (Durnford and East).
V. & P.	Dart on Vendors and Purchasers.
Vent.	Ventris' Reports.
Ver.	Vernon's Reports.
V. & B.	Vesey and Beames' Reports.
Ves.	Vesey Junior's Reports.
Ves. Sr.	Vesey Senior's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
Y. & C. Ch.	Young and Collyer's Cases in Chancery.
Y. & C.	Young and Collyer's Reports (Exchequer).

ERRATA AND ADDENDA.

P. 13. Note (*g*). For L. R. 5 E. read L. R. 5 Eq.

P. 52. In a recent case, the appointment of a receiver was held to stop time from running against an outside incumbrancer who had notice of his appointment. *Penney* v. *Todd*, 26 W. R. 502.

P. 56. (*o*). Add reference to *Cunningham* v. *Foot*, 26 W. R. 858.

P. 61. *Magdalen College* v. *Knotts* was reversed on appeal, 26 W. R. 640.

P. 85. Note (*m*). For 4 L. Ch. R. read 4 I. Ch. R.

Pp 98-99. (*Note* 10). Add reference to *Smith* v. *Hill*, 26 W. R. 878.

P. 130. Where the owners of 3-16ths requested a sale, it was held that some of the owners of the other 13-16ths (who opposed a sale) were entitled to purchase the 3-16ths, and a reference to chambers was directed to ascertain their value. *Gilbert* v. *Smith*, 26 W. R. 905.

P. 132. (*s*). For "*Johnns*" read "*Joberns.*"

P. 172. In a recent case, MALINS V.-C. made an order authorising trustees to sell, although no conditional contract had been entered into. *Re Andrews*, 26 W. R. 811.

THE STATUTES OF LIMITATION

AFFECTING

REAL ESTATE.

3 & 4 Will. 4, c. 27.
3 & 4 Will. 4, c. 42, s. 3.
7 Will. 4 & 1 Vict., c. 28.
6 & 7 Vict. c. 54, ss. 1 and 3.
23 & 24 Vict. c. 38, s. 13.
36 & 37 Vict. c. 66, s. 25 (2).
37 & 38 Vict. c. 57.

SUMMARY.

THE principal Statute of Limitation now in force affecting real estate is the 3 & 4 Will. 4, c. 27, which was passed in 1833, and is known as the statute of Will. 4. It will remain in force until the end of the year 1878; and on the 1st of January, 1879, the 37 & 38 Vict. c. 57, the short title of which is the "Real Property Limitation Act, 1874," will come into operation. The last mentioned Act, however, repeals only portions of the older enactment, and is to be read with the rest of it.

Sect. 1 of the statute of Will. 4 is merely an interpretation clause.

Sect. 2 fixes the time of limitation as respects actions to recover real estate at twenty years from the time when the right first accrued. By sect. 1 of the Act of 1874 this time is reduced to twelve years as respects actions brought after the 1st of January, 1879.

Sect. 3 of the original Act is supplementary to these provisions, and fixes the time when such right is to be deemed to have accrued in certain cases.

Sects. 4, 5, and 20 of the Act of 1833 apply to reversionary interests and other future estates. Sect. 2 of the Act of 1874 will be substituted for sect. 5 of the original Act after 1878, and applies to the case of the same person being entitled to two estates in the same land—one in possession and the other in reversion.

Provisions with regard to estates tail are contained in sects. 21, 22, and 23 of the original Act. These sections are not affected by the Real Property Limitation Act, except that the time of limitation is reduced from twenty to twelve years. In effect they provide that remaindermen, whom a tenant in tail might have barred, shall be in the same position as regards the statute as if they claimed through him.

Sect. 28 of the original Act applies to the case of a mortgagee in possession, and provides that the mortgagor shall be barred by twenty years of such possession unless his right to redeem is acknowledged in the meantime. By sect. 7 of the Real Property Limitation Act twelve years is substituted for twenty.

When the mortgagor is in possession the case is taken out of sect. 3 of 3 & 4 Will. 4, c. 27, by 7 Will. 4 & 1 Vict. c. 28, and time only runs against the mortgagee from the last payment of any portion of the principal or interest.

The relation between landlord and tenant forms the subject of sects. 7, 8, and 9 of the Act of 1833, which fix the period when time begins to run in the case of tenancies at will, from year to year, and for a term of years respectively. The time of limitation is the same as in the case of trespassers; and sect. 35 provides that the receipt of rent shall be deemed to be receipt of profits.

Under sects. 12 and 13 of the Act of 1833 the possession of one or more of several joint owners, or of a relation of the person entitled, may be adverse.

When an acknowledgment of the title of an owner against whom the statute is running, is given by the person in possession time will, under sect. 14, recommence to run from such acknowledgment. Sects. 28, 40, and 42 also contain special provisions as to acknowledgments in the cases of mortgagees in possession and of moneys charged on land.

Disabilities are dealt with by sects. 16, 17, 18, and 19 of the Act of 1833, and sects. 3, 4, and 5 of the Act of 1874. Under the former, ten years further time was given to persons under any disability from the time when such disability ceased, provided that such ten years expired within forty years from the accrual of right. By the Act of 1874 the ten years is reduced to six years, and the extreme period of saving for disabilities to thirty years; while absence beyond seas will cease to be a disability. But by sects. 25 and 26 of 3 & 4 Will. 4, c. 27, time will not run at all in cases of express trust and concealed fraud. By sect. 10 of the Act of 1874, the provision as to express trusts is repealed so far as money charged on land is concerned.

Sect. 34 provides that when the full time has run against an owner, his right and title—and not merely his remedy—shall be barred.

By sect. 24 equitable estates are to be barred in the same time as legal estates, while by sect. 27 the jurisdiction of equity in cases of acquiescence and laches, where the time limited by the statute may not have run, is preserved.

Sect. 6 of 3 & 4 Will. 4, c. 27, provides that time shall run continuously against an administrator, as it would have done against his intestate if alive.

Advowsons and the property of spiritual and eleemosynary corporations sole are dealt with by sects. 29, 30, 31, 32, and 33. Speaking generally, their effect is to bar a patron by three adverse presentations or sixty years' adverse possession, and the extreme period of limitation

is fixed at one hundred years. By sect. 3 of 6 & 7 Vict. c. 54, these provisions are expressly extended to bishops who are also patrons. Ecclesiastical and eleemosynary corporations sole are barred by adverse possession for sixty years, or two incumbencies and six years.

These provisions are not affected by the Act of 1874.

Sect. 41 provides that only six years' arrears of dower may be recovered, while sects. 40 and 42 deal with money charged on land, legacies, and the interest thereon. The principal money may be recovered within twenty years after the accrual of a right to receive the same or an acknowledgment, but arrears of interest can (under sect. 42) only be recovered for six years.

Sect. 8 of the Act of 1874 reduces the time of limitation for the principal to twelve years.

Sect. 3 of 3 & 4 Will. 4, c. 42, does not strictly apply to land or money charged on land, but provides that money secured by (*inter alia*) bond or covenant may be recovered within twenty years, and arrears of interest for the whole time are recoverable. As money charged on land is often also secured by bond or covenant, the question has often arisen, in such cases, whether six or twenty years of interest can be recovered. After 1878 there will also be a conflict between the two Acts with respect to the principal money, the time of limitation for money charged on land being twelve years, and for money secured by bond or covenant twenty years.

Sects. 10 and 11 of the Act 3 & 4 Will. 4, c. 27, take away the saving of rights formerly effected by mere entry and continual claim.

Sects. 36, 37, 38, and 39 contain provisions for the abolition of actions known as real and mixed actions.

3 & 4 WILL. 4, c. 27.

An Act for the Limitation of Actions and Suits relating to Real Property; and for simplifying the remedies for trying the rights thereto.

INTERPRETATION CLAUSE.[1]

3 & 4 Will. 4, c. 27, § 1. Interpretation clause.

BE it enacted, &c., that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land,"[2] shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes[3] (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent"[4] shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which

3 & 4 Will. 4, c. 27, § 1.

the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person"[5] shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Effect of interpretation clause.

[1] As to the general effect of an interpretation clause, see the remarks of LORD SELBORNE in *Meux* v. *Jacobs* (*a*).

What "land" includes.

[2] The word land in this section has been held not to include turnpike tolls (*b*). On the other hand a mortgage of a canal, works and rates was held to come within the statute (*c*). In the latter case, however, the canal itself was conveyed, while in the former the soil of the road was not.

Turnpike tolls.

But it may be remarked that mortgages of turnpike tolls—even where there was no conveyance of the road or the toll-houses—have been held to be mortgages of "hereditaments" within the Statutes of Mortmain (*d*), and it will be noticed that this section extends the meaning of the word "land" to "all corporeal hereditaments" . . . "or interests in them" and the word "rent" to all "periodical sums of money charged upon or payable out of any land."

Copyholds.

The Act applies to copyholds, not only as between rival claimants, whether as lords or copyholders, but also as between a lord and his tenants (*e*).

Dower.

Dower is an "interest in land" within the meaning of the Act (*f*). See sect. 41 (*g*).

Timber.

Timber appears not to be within the Act. It has been held that the right of action of a reversioner in respect of timber wrongfully cut and sold by a tenant for life was for "money had and received," and was barred in six years (*h*).

Tithes.

[3] There is an ambiguity in the word "tithes," and it may now be considered as settled that the Act is not a bar as between tithe-owner and occupier; but only as between rival claimants to an estate

(*a*) L. R. 7 H. L. 493.
(*b*) *Mellish* v. *Brooks*, 3 B. 22.
(*c*) *Hodges* v. *Croydon Canal Co.*, 3 B. 86—89.
(*d*) *Knapp* v. *Williams*, 4 Ves. 430, n; *Howse* v. *Chapman*, 4 Ves. 452.
(*e*) *Walters* v. *Webb*, L. R. 5 Ch. 531; 2 Not. 2914.
(*f*) *Marshall* v. *Smith*, 5 Giff. 37, 13 W. R. 198; 1 Not. 3367.
(*g*) *Infra*, p. 90.
(*h*) *Higginbotham* v. *Hawkins*, L. R. 7 Ch. 676; 3 Not. 159.

in (or the receipt of) tithes (*i*). One decision (*j*) inconsistent with this view, was disapproved of (*k*), and subsequently reversed (*l*). A tithe rent charge is "rent" within the meaning of this section (*m*).

Tithe rent charge.

[4] There is a similar ambiguity in the word "rent" as used in the Act. In this section it is used in two senses, (1) in the sense of a rent charged upon land, *i.e.* a rent charge, or "rent of inheritance;" and, (2) in the sense of a rent reserved by a lease. *Per* LORD DENMAN, C. J. (*n*). See also notes to ss. 2, 3, 9 and 42 (*infra*, pp. 3, 9, 14, 30, 92).

Meaning of "rent."

Heriots. Quit rents.

How far heriots are included in the word "rent" has given rise to much discussion. *Semble* that where a heriot or quit-rent becomes due at intervals of more than twenty years it is not rent within ss. 1, 2 and 3. *Per* PARKE, B. (*o*). A distinction was drawn in *Earl Chichester* v. *Hall* (*p*) between heriots reserved by deed and heriots due by the custom of a manor. It was there said that in cases of the first description (heriot-service) time would not run from the last receipt; but from the time when the right to take a heriot accrued and was not enforced; and the same rule was held to apply to a quit-rent. At the same time it was doubted whether heriots of the second description (heriot custom) came within the statute at all; and the doubt has been confirmed by a very recent case (*q*) in which a strong opinion was expressed that no heriots of any description are within ss. 2, 3, 34 and 42; and it was held that the failure, by a lord of the manor, to seize a heriot due by the custom, was no bar to the right of a subsequent lord to a heriot which accrued due in respect of the same lands more than twenty years later.

Person.

[5] The Attorney-General, the rector, the churchwardens and the overseers of a parish are not "persons" within this section (*r*), but the poor of a parish are (*s*).

The Crown.

"The Statute of Limitations has relation only to actions between subject and subject; the Crown cannot be bound by it." *Per* BLACKBURN, J. (*t*). This proposition was at one time doubted (*u*).

(*i*) *Lord Shannon* v. *Hodder*, 2 I. L. R. 223; *Lord Shannon* v. *Stoughton*, 3 I. L. R. 521; *Dean, &c., of Ely* v. *Cash*, 15 M. & W. 617.

(*j*) *Dean, &c., of Ely* v. *Bliss*, 5 B. 574.

(*k*) *Shiel* v. *Incorporated Society*, 10 I. Eq. R. 411.

(*l*) 4 D. M. G. 459.

(*m*) *Shiel* v. *Incorporated Society*, 10 I. Eq. R. 411.

(*n*) *Angell* v. *Angell*, 9 Q. B. 355.

(*o*) *Owen* v. *De Beauvoir*, 16 M. & W. 566.

(*p*) 17 L. T. (Q. B.) 121.

(*q*) *Lord Zouche* v. *Dalbiac*, L. R. 10 Ex. 172; 3 Not. 1883.

(*r*) *Attorney-General* v. *Magdalen College*, 18 B. 240, 247, 248.

(*s*) *Magdalen College* v. *Attorney-General*, 6 H. L. C. 210.

(*t*) *Rustomjee* v. *The Queen*, 1 Q. B. D. 491; 3 Not. 2718.

(*u*) Br. Lim. p. 248. See also 9 Geo. 3, c. 16, and 24 & 25 Vict. c. 62.

3 & 4 Will. 4, c. 27, § 1. Charities.

Charities are within the statute (*x*), though this also has been doubted (*y*).

TIME OF LIMITATION.

3 & 4 Will. 4, c. 27, § 2. Time of limitation as regards land and rent fixed at twenty years (till 1st January, 1879),

2[1]. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three,[3] no person shall make an entry or distress or bring an action to recover any land[4] or rent,[5] but within twenty[2] years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued,[6] to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty[2] years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued,[6] to the person making or bringing the same.[7]

[1] By sect. 9 of the Real Property Limitation Act, 1874 (*z*), the above section is repealed from and after the 1st January, 1879, on which day the last-mentioned Act will come into operation. Sect. 1 of the Act of 1874 is as follows:

37 & 38 Vict. c. 57, § 1. and after that date at twelve years.

1. After the commencement of this Act[3] no person shall make an entry or distress, or bring an action or suit,[2] to recover any land[4] or rent,[5] but within twelve[2] years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued[6] to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve[2] years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall

(*x*) *Attorney-General* v. *Magdalen College*, 6 H. L. C. 189; *Commissioners of Donations* v. *Wybrants*, 2 J. & La. T. 182.

(*y*) *Incorporated Society* v. *Richards*, 1 Dr. & War. 287.

(*z*) 37 & 38 Vict. c. 57.

have first accrued[6] to the person making or bringing the same.[7]

3 & 4 Will. 4, c. 27, § 2. 37 & 38 Vict. c. 57, § 1.

[2] It will be seen that the old and new enactments are similarly worded. The only difference is the substitution of "twelve" for "twenty" years, and the addition of "or suit," after "action." The latter alteration appears to have been rendered unnecessary by the Judicature Act, 1875 (*a*). R. S. C., Ord. I. r. 1, gives the name of "action" to proceedings which were formerly known as "suits."

The following decisions upon sect. 2 of the old Act will apply equally to the substituted section.

[3] This section is not restricted, but merely explained, as regards doubtful cases, by sect. 3; and therefore a case may be written sect. 2, although the time of accrual of right is not provided for by sect. 3 (*b*).

§ 3 explains but does not restrict § 2.

[4] A suit by the heir of a copyholder to enforce admittance against the lord who had seized *quousque* forty years before, was held to be an action to recover land within this section, although it was contended on behalf of the plaintiff that a seizure *quousque* did not destroy his right as an absolute forfeiture would have done (*c*). *Semble* that a tenant in tail in possession is barred by this section and not by sect. 21 (*d*).

Copyholds. Seizure *quousque*. Tenant in tail.

[5] "I think it clear from repeated consideration of it, that 'rent' in the sense in which it is spoken of in the second section means rent of inheritance, and that it does not mean rent reserved by a lease, for example, or rent in the common and ordinary form of a render of rent for property." *Per* LORD ST. LEONARDS (*e*). This section therefore has no application between landlord and tenant *as such* (*f*). Their rights under the Act are governed by sect. 42, *infra* (*g*). This follows from the doctrine that the possession of a tenant is not adverse to, but identical with, his landlord's possession (*h*). But see, on this point, notes to sects. 3, 7, 8, and 9 (*i*). A penal rent is not within this section (*k*).

Meaning of "rent" in these sections. Landlord and tenant.

[6] As to when the right first accrues in certain cases, see sect. 3 (*l*).

(*a*) 38 & 39 Vict. c. 77.

(*b*) *James* v. *Salter*, 3 Bing. N. C. 552-3.

(*c*) *Walter* v. *Webb*, L. R. 5 Ch. 531; 2 Not. 2914. See also *Rex* v. *Agardsley*, 5 Dow. 19.

(*d*) *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex. 153—4, 2 Not. 4596.

(*e*) *Dean, &c., of Ely* v. *Bliss*, 4 D. M. G. 472. See also *Re Turner*, 11 I. Ch. R. 304; *Angell* v. *Angell*, 9 Q. B. 355; *Paget* v. *Foley*, 14 M. & W. 214.

(*f*) *Grant* v. *Ellis*, 9 M. & W. 113.

(*g*) *Archbold* v. *Scully*, 9 H. L. C. 360.

(*h*) *Saunders* v. *Lord Annesley*, 2 Sch. and Lef. 95.

(*i*) Pp. 13, 24—32, *infra*.

(*k*) *Daly* v. *Lord Blomfield*, 5 I. L. R. 65.

(*l*) P. 10, *infra*.

3 & 4 Will. 4, c. 27, § 2. 37 & 38 Vict. c. 57, § 1.

[7] The Court will compel a purchaser to accept a title depending upon adverse possession under the statute, established by affidavit or parol evidence, because the estate itself (*m*) and not merely the remedy is barred (*n*).

WHEN TIME BEGINS TO RUN—GENERALLY

3 & 4 Will. 4, c. 27, § 3.

When right accrues and time begins to run in certain cases.

3. And be it further enacted,[1] that in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued [2] such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) [3] to him, or some person through whom he claims, by a person being in respect of

(*m*) See sect. 34, *infra*.
(*n*) *Scott* v. *Nixon*, 3 Dr. and War. 388—405.

the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest,[4] and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture[5] or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. 3 & 4 Will. 4, c. 27, § 3.

[1] Sects. 2 and 3 changed the law with regard to what is considered adverse possession. "We are all clearly of opinion that the 2nd and 3rd sections," said LORD DENMAN (*o*), "have done away with the doctrine of non-adverse possession; and, except in cases falling within the 15th section of the Act, the question is whether twenty years (or, under the Act of 1874, twelve years) have elapsed *since the right accrued* whatever be the nature of the possession" (*p*). Formerly a constructive permission or authority was *implied* in many cases; but it may now be laid down as a general rule (subject to certain qualifications which are mentioned below), that mere possession by any person other than the true owner is adverse, unless such person is in possession (α) by the *express* permission of the true owner, or (β) under a title which he believes to be lawful (*q*). (α) The case of trustee and *cestui-que trust* may be considered to come within the first of these exceptions; for the possession of a

Non-adverse possession abolished.

Mere possession now usually adverse.

(*o*) *Nepean* v. *Doe*, 2 M. & W. 911; 2 Sm. L. C., 7th ed., 580.

(*p*) See also *Culley* v. *Taylorson*, 11 A. & E. 1015.

(*q*) *Milner* v. *Brightwen*, 10 East, 583. See, however, *Palmer* v. *Eyre*, 17 Q. B. 366 and *Chadwick* v. *Broadwood*, 3 B. 808.

3 & 4 Will. 4, c. 27, § 3.

Exceptions. Trustee and *cestui-que-trust.* Constructive trustee.

trustee is equivalent to that of his *cestui-que trust* (*r*). As regards the receipt of rents by a constructive trustee, the present state of the law was observed upon by STUART, V.-C., in 1863, as follows:—"The fact of a person receiving the rents of a property *raises a presumption that he receives them in the character of owner;* but this presumption may be rebutted in many ways. It may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession; or by evidence of the mode in which he has dealt with the rents. In *Thomas* v. *Thomas* (p. 41, *infra*), as I understand it, the V.-C. WOOD had to consider the case of a father who had entered upon his infant son's lands, and in that case he held that the father had entered as guardian, though he, then, expressed an opinion that an infant could not, in all cases, treat a stranger as a bailiff for the purpose of avoiding the effect of the Statute of Limitation. But in the present case, when the person who entered was the uncle, the nearest male relative of the infant, and the executor named in her father's will, and where he employed the rents in keeping down the interest on the mortgage, the case can hardly be considered as a case of an entry by a stranger. . . . . Where possession is relied upon as a bar it ought to be a clear and absolute possession, with nothing equivocal" (*s*).

Solicitor and client.

Therefore time will not run in favour of a solicitor who has paid off a mortgage belonging to his client. His possession is considered as that of his client (*t*).

Principal and agent.

And the possession of an agent is the possession of his principal (*u*).

Possession under colour of legal title.

(*β*). Possession is not adverse if the claimant enters under colour of a legal title:—

Thus, a person who enters into possession as tenant-for-life, *e.g.* under a will, is not allowed afterwards to say that such possession was unlawful, so as to give his heir a right, by virtue of the statute, against the remainderman. *Per* MARTIN, B. (*x*).

It is clear also (*y*) that land of which a testator is wrongfully in possession passes by his will. But, in a recent case (*z*), MALINS, V.-C., drew a distinction between the above cases and cases where the testator did not *intend* to pass the land claimed. A widow

(*r*) *Garrard* v. *Tuck*, 8 C. B. 231; *Drummond* v. *Sant*, L. R. 6 Q. B. 763; 1 Not. 4169. See, however, *Jacobs* v. *Phillips*, 10 Q. B. 130; Darb. & Bos. Lim. 268—9; Ban. Lim. 193—4, and notes to sect. 25, *infra*, pp. 59, 60.

(*s*) *Pelly* v. *Bascombe*, 4 Giff. 395.

(*t*) *Ward* v. *Carttar*, L. R. 1 Eq. 29; 1 Not. 4520.

(*u*) *Williams* v. *Pott*, L. R. 12 Eq. 149; 2 Not. 4171.

(*x*) *Anstee* v. *Nelms*, 1 H. & N. 232; see also *Board* v. *Board*, L. R. 9 Q. B. 48; 3 Not. 1023.

(*y*) *Hawksbee* v. *Hawksbee*, 11 H. 230, and *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; 1 Not. 4463.

(*z*) *Paine* v. *Jones*, L. R. 18 Eq. 320; 3 Not. 1635.

entered into possession of all her husband's real estate as tenant for life under his will, and more than twenty years afterwards she found that part of the estate did not pass by the devise to her because it had been purchased after the date of the will, which was made before 1838. Thereupon she sold it to a purchaser for value, who set up the Statute of Limitation, and the remaindermen under the will were held to be barred. Inasmuch as the widow entered and held the property during the whole twenty years *under the belief that she was entitled to it* as tenant for life *under the will*, it is submitted with great deference, that this decision, although certainly consonant with the spirit of the Statutes of Limitation, is irreconcilable with the *dictum* cited above in *Anstee* v. *Nelms*. 3 & 4 Will. 4, c. 27, § 3.

Landlord and tenant.

The possession of a tenant, of the land subject to his tenancy, at first sight appears to come within both exceptions, (α) and (β). Accordingly, in respect of such land, the possession of the tenant is deemed the possession of his landlord so long as the tenancy exists. But after the expiration of the tenancy, time begins to run in his favour against his landlord; so that if he remains in possession for twenty years after such expiration without payment of rent, the landlord's title will be barred (*a*). A corporation granted a lease as lord of a manor, and the lessee retained the court rolls and remained in possession of the lands after the lease expired. The corporation took no action for twenty-two years, and was then held to be barred (*b*).

What possession sufficient to bar owner.

[2] Mere discontinuance of possession is not sufficient to bring a case within the statute. There must be both absence of possession by the rightful owner, and actual possession by some other person (*c*). And such possession must be by the person wishing to assert the statute; and not by a third person, or by custody of the law. *Per* CHRISTIAN, L. J. (*d*).

Accordingly, it was held that mere omission to work quarries, reserved to the lessor by a lease of the surface of the lands, was not a discontinuance of possession within this section. The original possession of the lessor remains unaltered in such a case (*e*). See also cases under sect. 26 (*f*). And fifty years' mere possession of a ditch on agricultural land was held not adverse (*g*). *Semble*, however, that it would have been different if the ditch had been built upon or used otherwise than as agricultural land. Where

(*a*) *Davey* v. *Oxenham*, 7 M. & W. 131; *Lansdell* v. *Gower*, 17 Q. B. 589, 11 Jur. 100. See also *Chadwick* v. *Broadwood*, 3 B. 303 (*infra*, p. 30).

(*b*) *Dean and Chapter of Wells* v. *Doddington*, 3 C. C. C. 73.

(*c*) *Smith* v. *Lloyd*, 9 Ex. 562—572.

(*d*) *Howlin* v. *Shepherd*, 19 W. R. 285; 3 Not. 299.

(*e*) *M'Donnell* v. *M'Kinty*, 10 I. L. R. 514—526.

(*f*) P. 63, *infra*.

(*g*) *Searby* v. *Tottenham Railway Co.*, L. R. 5 E. 409; 2 Not. 169.

3 & 4 Will. 4, c. 27, § 3.

fence between adjoining owners consists of a hedge and ditch, the ditch is presumed to belong to the owner of the land on the *opposite* side of the fence (*h*).

As to adverse possession of a boundary wall, see *Phillipson* v. *Gibbon* (*i*). In this case the wall contained a stone bearing an inscription, which decided the ownership.

Where a gravel pit, which had been allotted to surveyors of highways was filled up and ploughed over by the adjoining owner, it was held that time, thereupon, began to run against the surveyors (*j*).

And where A. demised land to B. for ever subject to a rent, reserving to himself a road to a well, and B. built a wall across the road, A.'s title was held to be barred in twenty years (*k*).

And, notwithstanding the doctrine that a tenant's possession is that of his landlord, if a tenant wrongfully occupies land belonging to his landlord, but not included in his lease, without payment of rent, for twenty years, the landlord will be barred by ss. 2 and 3 (*l*).

See *Keyse* v. *Powell* (*m*) as to possession of mines by a tenant to whom a moiety of the fee simple was conveyed during the tenancy.

Copyholds.

Time will run against a copyholder from a seizure *quousque* by the lord of the manor (*n*).

Rent.

Rent in this section means "rent charge" only (*o*). The right to a quit-rent is barred in twenty years from the last payment (*p*). Land subject to a fee farm rent was sold, and the vendor continued to pay the rent for sixty years. It was held that there had been no discontinuance of receipt of the rent, and the owner was not barred (*q*).

As regards landlord and tenant, there is now a distinction between mere *non-receipt* of rent and *payment to a stranger* (*r*). This was not the case formerly (*s*).

Royalties.

As to royalties reserved by a mining lease, see *Denys* v. *Shuckburgh* (*t*).

[3] "Other than a will." As to these words, see *James* v. *Salter* (*u*).

Future estates.

[4] Time was held to run against the heir of a married woman whose husband had abandoned possession while entitled in right of his

Remainder

wife (*x*). But where a husband conveyed his wife's estate during

(*h*) Lord St. Leonard's Handy Book, 8th ed., p. 74.

(*i*) L. R. 6 Ch. 428—434, *infra*, p. 38.

(*j*) *Smith* v. *Stocks*, 17 W. R. 1135; 2 Not. 4822.

(*k*) *Tottenham* v. *Byrne*, 12 I. C. L. R. 376.

(*l*) *Baddeley* v. *Massey*, 17 Q. B. 373. Compare *Drummond* v. *Sant*, L. R. 6 Q. B. 763; 2 Not. 4169; *Dixon* v. *Baty*, L. R. 1 Ex. 259; 1 Not. 5156.

(*m*) 2 El. & Bl. 132.

(*n*) *Walter* v. *Webb*, L. R. 5 Ch. 531; 2 Not. 2914.

(*o*) *Angell* v. *Angell*, 9 Q. B. 355.

(*p*) *De Beauvoir* v. *Owen*, 5 Ex. 166.

(*q*) *Adnam* v. *Sandwich*, 2 Q. B. D. 485; 4 Not. 1058.

(*r*) 2 Sm. L. C., 6th ed., 643.

(*s*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 624.

(*t*) 4 Y. & C. 42.

(*u*) 3 Bing. N. C. 554.

(*x*) *Corbyn* v. *Bramston*, 3 A. & E. 63.

coverture without a fine, time did not run against the wife's heir; the wife's interest being held a "future estate or interest" to take effect on the termination of the coverture (*y*). Similarly where copyholds were surrendered to the use of a husband and wife for life, and the heirs of the husband, the estate of the assignee in bankruptcy of the husband (who had absconded) was held to be a "future estate," to take effect on the death of the wife (*z*). And where a tenant in tail purported to dispose of the fee simple it was held that the right of his heir did not accrue till the death of the grantor (*a*). In the last case, and also in *Earl of Abergavenny* v. *Brace* (*b*), a distinction was drawn between an act which put it out of the power of a tenant in tail to enter (*e.g.*, a conveyance), and a voluntary abandonment of possession, where the tenant in tail could enter at any time; and in the latter case, time was held to run against him and all future tenants in tail (*c*). As to an estate tail see also sects. 21—23 (*d*).

3 & 4 Will. 4, c. 27, § 3.

after life estate.

Tenant in tail in remainder.

[5] See sect. 4 (*e*).

WHEN TIME BEGINS TO RUN—MORTGAGES.

7 Will. 4 & 1 Vict. c. 28.

Doubts arose as to construction of 3 & 4 Will. 4, c. 27, with regard to mortgages.

Whereas doubts have been entertained[1] as to the effect of a certain Act of Parliament made in the 3rd and 4th years of his late Majesty King William 4, intituled "*An Act for the Limitation of Actions and Suits relating to real Property, and for simplifying the remedies for trying the rights thereto,*" so far as the same relates to mortgages; and it is expedient that such doubts should be removed. Be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled and by the authority of the same, that it shall and may be lawful[2] for any person entitled to or claiming under any mortgage[3] of land, being land within the definition contained

Mortgagees may bring actions

(*y*) *Jumpsen* v. *Pitchers*, 13 Sim. 327—332.

(*z*) *Johnson* v. *Liversedge*, 11 M. & W. 517—525.

(*a*) *Rimington* v. *Cannon*, 12 C. B. 18—33.

(*b*) L. R. 7 Ex. 145.

(*c*) *Earl of Abergavenny* v. *Brace*, L. R., 7 Ex. 145; 2 Not. 4596. See, however, *Williams* v. *Pott*, L. R. 12 Eq. 147; 2 Not. 4171.

(*d*) *Infra*, pp. 47—51.

(*e*) *Infra*, pp. 17, 18.

7 Will. 4 & 1 Vict. c. 28.

in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years [4] next after the last payment of any part of the principal money or interest [5] secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.

within twenty years after last payment of interest.

[1] The "doubts" here referred to were expressed by PATTESON, J., as follows:—"How far under the 3rd section it is necessary for the mortgagee to bring his action within twenty years from the day of default I cannot say: I do not see my way at all. If the 3rd section was intended to comprehend the case of a mortgage, it is very ill penned; and the 40th section, if meant to apply to actions of ejectment, is still worse penned (*f*).

Mortgagees have same rights as before 3 & 4 Will. 4, c. 27.

[2] This Act preserves to a mortgagee the same rights as if 3 & 4 Will. 4 had not been passed, and he may, in some cases, maintain an action against a person who has acquired title by possession so far as the mortgagee is concerned.

Even against persons who have acquired title against mortgagor.

In 1821 A. let his sister B. into possession of a house; and she remained there without payment of rent or acknowledgment of her brother's title for thirty years. In 1823 A. mortgaged the property to X., and paid interest as late as 1841. It was held that such payment by A. gave X. twenty years from 1841, within which to bring an action against B., although A.'s title was barred (*g*).

And where the mortgagor let his son into possession, and allowed him to acquire title against him, POLLOCK, C. B., said: "No authority is wanted to show that the mortgagee to whom interest has been paid within twenty years has a title against any person claiming under the mortgagor" (*h*).

But if a person is holding adversely to the mortgagor at the date of the mortgage, and continues so to hold, it has been considered that he may acquire title also against the mortgagee (*i*). This opinion, however, appears to be inconsistent with the decision in *Palmer* v. *Eyre* (*k*).

(*f*) *Jones* v. *Williams*, 5 A. & E. 297. Compare *Du Vigier* v. *Lee*, 2 H. 326—332; *Palmer* v. *Eyre*, 17 Q. B. 366.

(*g*) *Palmer* v. *Eyre*, 17 Q. B. 366.

(*h*) *Ford* v. *Ager*, 11 W. R. 1073—4; 1 Not. 855.

(*i*) *Eyre* v. *Walsh*, 10 I. C. L. R. 346—353.

(*k*) 17 Q. B. 366.

[3] A purchaser from mortgagor and mortgagee, the mortgage being paid off, is a person "claiming under" the mortgage; and has the mortgagee's rights as against third persons who may have acquired rights against the mortgagor. Time runs against him from the payment off of the mortgage (*l*). 7 Will. 4, & 1 Vict. c. 28. Purchaser from mortgagor and mortgagee.

"A mortgagor cannot, by putting the equity of redemption in settlement, affect the rights of the mortgagee against the mortgaged property. He cannot, by carving out derivative interests in the equity of redemption, create any rights which he had not himself. No doubt, the tenant for life is the party bound to pay the interest; but still, mere *laches* or neglect to demand the interest from the tenant for life will not prejudice the claim of the mortgagee against those in remainder. This was decided by *Loftus* v. *Swift* (*m*), in this Court before Lord Redesdale, and is the settled rule of this Court." *Per* LORD ST. LEONARDS, when L. C. of Ireland (*n*). Persons claiming under settlement of equity of redemption.

[4] This period is not reduced to twelve years by the Act of 1874.

[5] An admission by a tenant for life of the equity of redemption, that interest has been paid within twenty years, does not prevent the statute from running in favour of the remainderman when no actual payment is proved (*o*).

Estates in three different counties were comprised in one mortgage, and a receiver of the rents of one of such estates was appointed by the Court, at the instance of the mortgagee. The mortgagor sold the other two estates; but it was held that only the equity of redemption passed, and that the payment of interest by the receiver preserved the mortgagee's rights as to all three estates (*p*).

FORFEITURE—REVERSIONERS.

4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture[1] or breach of condition,[2] shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover 3 & 4 Will. 4, c. 27, § 4. Reversioner need not take advantage of a forfeiture.

(*l*) *Baddeley* v. *Massey*, 17 Q. B. 373.
(*m*) 2 Sch. & Lef. 642.
(*n*) *Wrixon* v. *Vize*, 2 Dr. & War. 192-202.
(*o*) *Gregson* v. *Hindley*, 10 Jur. 383.
(*p*) *Chinnery* v. *Evans*, 11 H. L. 115; 2 Not. 2848.

3 & 4 Will. 4, c. 27, § 4.

such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.[3]

[1] This section is declaratory of the rule that no one need take advantage of a forfeiture. A condition that in certain events a mining license should be void was held to mean voidable at the option of the lessor; and such option would not be presumed in the absence of any act showing an intention to determine the term for which the licence was granted (*q*).

Power of re-entry is optional.

A similar decision was given in respect of a proviso that, upon breach of covenant, a lease should be "wholly void," coupled with a power of re-entry (*r*). To hold otherwise would be contrary to the universal principle that a person shall never take advantage of his own wrong. *Per* LORD ELLENBOROUGH (*s*). The same principle was laid down and acted upon in a case (*t*) where a contract was held void, at the option of the vendor only, on the default of the purchaser in payment of certain auction duty, which he was bound to pay. Compare the *ratio decidendi* in *Thomas* v. *Brown* (*u*).

In another case, a similar provision to that in *Arnsby* v. *Woodward* was held voidable only; and an opinion was expressed by PARKE, B., that an absolute unqualified demand of rent, by a person having sufficient authority, would (like the actual receipt of rent) have amounted to a waiver of the forfeiture (*x*).

Limitations over on breach of condition.

[2] This section applies to limitations on breach of condition as well as to other cases of forfeiture, and ought to be read in its widest sense. Where a tenant in tail, who had incurred a forfeiture by not assuming the name and arms of the testator within a given time, remained in possession for more than twenty years, the remainderman was not barred under this section and s. 3; but his right was held to accrue on the death of such tenant in tail (*y*).

Name and arms clause.

In the same case a question also arose whether breach of a condition in a will, of which the person thereby affected had no notice,

(*q*) *Roberts* v. *Davey*, 4 B. & Ad. 664.

(*r*) *Arnsby* v. *Woodward*, 6 C. B. 579.

(*s*) *Rede* v. *Farr*, 6 M. & S. 124.

(*t*) *Malins* v. *Freeman*, 4 Bing. N. C. 395.

(*u*) 1 Q. B. D. 714.

(*x*) *Nash* v. *Birch*, 1 M. & W. 402. See also *Hyde* v. *Watts*, 12 M. & W. 254—268; and *Flower* v. *Peck*, 1 B. & Ad. 428; *Hughes* v. *Palmer*, 19 C. B. (N. S.) 393; *Gregson* v. *Harrison*, 2 T. R. 425—431.

(*y*) *Astley* v. *Earl of Essex*, L. R. 18 Eq. 290; 3 Not. 1582.

amounted to a forfeiture. It had been previously held that the *heir-at-law* of a testator could not be defeated by such a condition, unless he had notice (*z*), and that the burden of proving notice was on the person setting up the breach (*a*). 3 & 4 Will. 4, c. 27, § 4.

But, as regards legatees or devisees, even when such devisees are tenants in tail, the rule is different; and they are bound by a condition in the will under which they take, though they may have been abroad and have never heard of the condition (*b*).

[5] See also notes to s. 5, *infra*.

WHEN TIME RUNS—FUTURE ESTATES.

5.[1] Provided also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion,[2] at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land,[3] or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.[4] 3 & 4 Will. 4, c. 27, § 5.

Previous possession of reversioner not to affect his right of entry on his reversion becoming an estate in possession.

[1] This section is repealed from the 1st of January, 1879, and s. 2 of the Act of 1874 will then take its place.

The liberal proviso contained in this and the first clause of the new section is considerably curtailed by s. 20 of the Act of 1833, which see (*infra*, p. 46). See also notes 5 and 6, *infra*, pp. 21, 22.

2. A right to make an entry or distress, or to bring an action[1] or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or 37 & 38 Vict. c. 57, § 2.

Provided

(*z*) *Kenrick* v. *Lord Beauclerc*, 11 East 657.

(*a*) *Taylor* v. *Crisp*, 8 Ad. & El. 788-9.

(*b*) *Porter* v. *Fry*, 1 Vent. 199; *Re Hodges' Legacy*, L. R. 16 Eq. 92; *Astley* v. *Earl of Essex*, L. R. 18 Eq. 290; 3 Not. 1582; *Powell* v. *Rawle*, L. R. 18 Eq. 243; 3 Not. 1583.

3 & 4 Will. 4, c. 27, § 5. 37 & 38 Vict. c. 57, § 2.

interest in reversion[2] or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land[3] or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent:[5] But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer;[6] and if the right of any such person[7] to make such entry or distress, or to bring any such action or suit, shall have been barred under this Act, no person afterwards claiming[8] to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make

the person entitled to the intervening estate shall have been in possession when his interest determined.

any such entry or distress, or bring any such action or suit, to recover such land or rent. 3 & 4 Will. 4, c. 27, § 5. 37 & 38 Vict. c. 57, § 2.

It will be noticed that the first paragraph of the new section merely amends its predecessor in three particulars :—

[1] As in sect. 1 of the Act of 1874, the words "or suit" are inserted after action. "Or suit."

[2] The words "or remainder or other future estate or interest" have also been added in the new section after "reversion." This alteration brings it into conformity with sect. 3 of the Act of 1833. "Or remainder."

[3] And the words "or rent," which appear to have been omitted by mistake, from sect. 5 of the Act of 1833 are inserted in the sect. 2 of the Act of 1874. "Or rent."

[4] The joint effect of ss. 3, 5, and 20 of the Act of 1833, seems to have been that when the same person was entitled to a particular estate (*e.g.*, for life), and also to the reversion, or a remainder, or other future estate in the same land or rent-charge, and had allowed his particular estate to become barred under sect. 2 of that Act, no new right accrued to him, unless in the meantime the land or rent-charge had been held or received by some person entitled to an intermediate estate between such particular estate and such reversion or remainder. Therefore where his reversion or remainder was immediately expectant upon his own particular estate, time ran continuously against him; and if one estate was barred, he had also lost all right to make any claim in respect to the other (*c*). Effect of §§ 3, 5, and 20 of 3 & 4 Will. 4, c. 27.

[5] The effect of ss. 3 and 20 of the Act of 1833, and the first clause of sect. 2 of the Act of 1874, will be similar.

But if the land or rent had been held or received by some other person in respect of an intermediate estate, the reversioner or remainderman had a new right of entry which he could have exercised at any time within twenty years after the termination of such intermediate estate. This right, however, is materially curtailed by the latter portion of the new section. Formerly, it would probably have been enough if the person entitled to the intermediate estate had *been* in possession or receipt, no matter for how short a time. After 1878, he must have *continued* in possession or receipt till the end of his estate or interest, or the reversioner will only have the periods mentioned in note 6, *infra*, p. 21, to bring an action. Effect of new enactment.

It may here be remarked that a reversion expectant on a trust term is not within these sections (*d*), unless actual possession be taken by the trustee of the term, or some person claiming under him. The

(*c*) See *Hall* v. *Mouldsdale*, 16 M. & W. 689.

(*d*) *Humble* v. *Humble*, 24 B. 535.

3 & 4 Will. 4, c. 27, § 5. 37 & 38 Vict. c. 57, § 2.

appointment of a receiver in a suit to enforce the trusts of a term is a sufficient possession (e).

[6] The second clause of sect. 2 of the Act of 1874 makes an important alteration in the law. Hitherto, as we have seen, a reversioner or remainderman, with the exception of the comparatively rare case in which his reversion or remainder was immediately expectant upon a prior particular estate of his own, which he had allowed to become barred, had always twenty years from the time when his reversion or remainder came into possession in the natural order of events, within which he might enter or bring an action, no matter how many owners of prior particular estates in the same land or rent-charge might have allowed their rights to slumber while an adverse claimant possessed the land or received the rent.

Under the Act of 1874, however, a reversioner or remainderman must assert his rights within twelve years after the termination of the prior estate, even if the owner of such prior estate remains in possession or receipt till such termination. If, on the other hand, such prior owner happens to be dispossessed (under circumstances which do not amount to a forfeiture) before the natural termination of his estate, the reversioner or remainderman must bring his action or make his entry either (α) within twelve years after such dispossession or (β) within six years after the natural termination of the prior estate and his own right to possession. It is presumed, however, that if the prior owner incurs a forfeiture (of which the reversioner or remainderman does not take advantage) and remains in possession or receipt until the natural termination of his estate, the reversioner or remainderman will still, by virtue of sect. 4 of the Act of 1833, have twelve years within which to assert his rights.

Compare the provision, as regards landlord and tenant, of sect. 9 (f).

"Any such person."

[7] The third clause of the new section is obscurely worded. The words "any such person" probably refer to the reversioner or remainderman whose rights are affected by the previous clauses of the section, and not to the owner of the prior estate.

"No person afterwards claiming."

[8] Whether the words "no person afterwards claiming" are confined to a person claiming through such reversioner or remainderman, is a question which the Court will probably be called upon to decide. Such would certainly be the more reasonable construction; but the intention of the legislature might have been more clearly expressed.

(e) *Re Bermingham's estate*, I. R. 5 Eq. 147—158.

(f) *Infra*, pp. 29, 30.

WHEN TIME RUNS—ADMINISTRATOR.

3 & 4 Will. 4, c. 27, § 6.

6. And be it further enacted, that for the purposes of this Act an administrator[1] claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time[2] between the death of such deceased person and the grant of the letters of administration.[3]

Time runs continuously against Administrator as it would have done against his intestate.

[1] The property of a testator vests in his executor from the time of his death; that of an intestate in his administrator, from the date of the grant of letters of administration. The former derives his title from the will, the latter from the Court (*g*).

[2] But the title of an administrator, when vested, relates back to the time of death, so that he can maintain an action, the cause of which arose after the death, but before the grant (*h*).

But such relation back does not extend to authorize any acts which prejudice the intestate's estate, but only enables the administrator to do acts for the benefit of the estate (*i*).

Title of administrator relates back in certain cases.

[3] This section was probably suggested by a decision under a former statute, to the effect that where a cause of action occurred to an intestate's estate after his death but before administration, time did not begin to run until the grant, on the ground that there was previously no person in existence capable of suing (*j*).

Reason for this enactment.

WHEN TIME RUNS—TENANCY AT WILL.

3 & 4 Will. 4, c. 27, § 7.

7. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent,[1] as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or

Tenancy at will. When right accrues.

(*g*) *Woolley* v. *Clark*, 5 B. & Ad. 744.

(*h*) *Tharpe* v. *Stallwood*, 5 Man. & Gr. 760; *Foster* v. *Bates*, 12 M. & W. 226; *Welchman* v. *Sturgis*, 13 Q. B. 552.

(*i*) *Morgan* v. *Thomas*, 8 Ex. 307; see also Williams on Executors, 7th ed. pp. 629—635.

(*j*) *Murray* v. *E. I. Co.*, 5 B. & Al. 214—5; see also *Pratt* v. *Swaine*, 8 B. & C. 287.

3 & 4 Will. 4, c. 27, § 7.

bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined:[2] Provided always, that no mortgagor[3] or cestuique trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Tenancy at will. Not retrospective.

This section is not retrospective, so as to include a case where the tenancy at will determined before the passing of the Act. In such a case time runs from the period when the tenancy at will would have determined if the Act had not been passed (*k*).

Meaning of "Rent."

[1] "A tenant at will of *land* out of which a rent is *reserved* cannot, by any possible construction of language, be said to be in *receipt* of the *rent* which he pays. . . . . The word *rent*, therefore, in the 7th section must mean *rent-charge*; and there is no absolute absurdity in supposing that a person seised in fee, or for life, of a rent charge might, for a gross sum of money, demise it for years, or at will, at a smaller rent." *Per* LORD DENMAN, C. J. (*l*).

Time runs from one year after commencement of tenancy at will, although *actual* determination may be much later, unless new tenancy at will is created.

[2] By this section the determination of a tenancy at will is thrown back to one year from its commencement. A tenancy at will by a son and the son's widow for twenty-one years was held a bar to the father's estate (*m*).

Where a tenant at will who entered in 1817 had been in possession ten years the owner entered, and cut and carried away stone without the consent of the tenant. Held that this determined the tenancy at will, but that the owner's right of action was, by this section, thrown back to 1818, unless a new tenancy at will was created. A tenancy at sufferance would be presumed after 1827 (*n*).

On appeal, in the same case, an assessment of land tax signed by the tenant (who was also assessor), in which he was named as occupier and the owner as proprietor, was held to be evidence of a new tenancy at will (*o*).

Opinion of Lord Campbell

The above cases were disapproved of by LORD CAMPBELL (*p*), who said—"It is difficult to contend that, universally, every tenancy at

(*k*) *Evans* v. *Page*, 5 Q. B. 767—771.
(*l*) *Angell* v. *Angell*, 9 Q. B. 356.
(*m*) *Goody* v. *Carter*, 9 Q. B. 863, 867.
(*n*) *Bennet* v. *Turner*, 7 M. & W. 226.
(*o*) *Turner* v. *Bennett*, 9 M. & W. 643.
(*p*) *Randall* v. *Stevens*, 2 E. & Bl. 650–1.

will shall be deemed to have expired by operation of law at the expiration of one year after its commencement; and the more reasonable construction to put upon the enactment might have been that, *where there has been no actual determination* of the tenancy by the act of the parties *within twenty-one years*, it shall be deemed to have determined at the expiration of the first year, making an occupation without payment of rent for twenty-one years a bar; but where there has been an *actual* determination of the tenancy within that period, whereby a new right of entry accrues, this clause of the statute shall have no operation, such tenancy being supposed by the statute to continue till the right of entry is barred." His Lordship held that the eviction of a tenant within twenty years from the commencement of the tenancy gave the owners a new right of entry, although the tenant immediately afterwards re-entered; and that it was immaterial whether he was subsequently a tenant at will or a tenant at sufferance. It must be remarked, however, that in this case the tenancy at will commenced before the passing of the Act, and therefore came within the rule laid down in *Evans* v. *Page* (*q*). But it was decided on the ground that the owners actually recovered possession within the twenty years.

3 & 4 Will. 4, c. 27, § 7. on this section.

And in spite of the opinion expressed by Lord Campbell, it must now be considered settled that the rule laid down in the earlier cases is correct. In a recent case before the Privy Council (*r*), Sir JOSEPH NAPIER said—"The reasonable construction of the provision is, that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it *may accrue sooner* by the *actual* determination of the term." In that case, a son who had been in possession, and dealt with the property as owner more than twenty-one years, was held to have acquired a title under this section.

Semble, however, that any entry or assertion of ownership by the proprietor will stop time from running under this section, because it terminates the existing tenancy at will and creates another; and time accordingly runs from the end of a year after such entry or assertion (*s*).

In cases under this section, therefore, the material question is, often, whether or not a new tenancy at will has been created by the acts of the parties, and it becomes necessary to consider how a tenancy at will may be created or determined:

Cases on creation of tenancy at will.

"A simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year; as, for instance, an agreement to pay rent by

(*q*) 5 Q. B. 767.
(*r*) *Day* v. *Day*, L. R. 3 C. P. 760.
(*s*) *Allen* v. *England*, 3 F. & F. 49.

3 & 4 Will. 4, c. 27, § 7.

the quarter, or some other aliquot part of the year." *Per* PARKE, B. (*t*).

Payment of rent quarterly or half-yearly raises a presumption of a tenancy from year to year (*u*). Such a presumption may, however, be rebutted by evidence of a contrary intention (*v*).

As to the effect of taking possession under an agreement for purchase or lease (*x*), and as to the various circumstances which have been held to constitute a tenancy at will (*y*), it is sufficient to refer the reader to the cases. An encroachment by a lessee, with the lessor's assent, of adjoining land belonging to the lessor, does not create a tenancy at will under this section. In such a case time does not run until the end of the lease (*z*), and the same rule applies to copyholds (*a*). A feoffment, followed by livery of seisin, was held to terminate a tenancy at will, even though the tenant was ignorant of it (*b*).

Cases on termination of tenancy at will.

A notice that unless the tenant at will pays what is due to the owner, the latter will take immediate steps to recover the property, terminates the tenancy (*c*). An existing tenancy at will may be terminated and a new one constituted by agreement (*d*):

"Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will." *Per* TINDAL, C. J. (*e*).

Semble that an agreement for sale would terminate the tenancy (*f*). See also as to what circumstances will operate as a determination, the cases cited below (*g*). The tenancy may be determined at any time (*h*).

Relation

[3] A mortgagor in possession is tenant to the mortgagee (*i*); but

(*t*) *Hall* v. *Wood*, 14 M. & W. 687. See also *Richardson & Langridge*, 4 Taunt. 128.

(*u*) *Braythwayte* v. *Hitchcock*, 18 M. & W. 494—497; *Cox* v. *Bent*, 5 Bing. 185.

(*v*) *Bastow* v. *Cox*, 11 Q. B. 122; *Dixie* v. *Davies*, 7 Ex. 89; *Lord* v. *Crago*, 6 C. B. 90—98.

(*x*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Hegan* v. *Johnson*, 2 Taunt. 148; *Right* d. *Lewis* v. *Beard*, 13 East. 216; *Newby* v. *Jackson*, 1 B. & C. 448; *Forrest & Chamberlaine*, 5 M. & W. 14.

(*y*) *Groves* v. *Groves*, 10 Q. B. 486; *Souster* v. *Pinhorn*, 8 Ex. 763; *Ley* v. *Peter*, 3 H. & N. 101; *Simpkin* v. *Ashurst*, 1 Cr. M. & R. 261; *Hodgson* v. *Hooper*, 11 Jur. N. S. 911—916.

(*z*) *Whitmore* v. *Humphries*, L. R. 7 C. P. 1; 2 Not. 4294.

(*a*) *Attorney-General* v. *Tomline*, 5 Ch. D.; 4 Not. 1340.

(*b*) *Ball* v. *Cullimore*, 2 Cr. M. & R. 120.

(*c*) *Price* v. *Price*, 9 Bing. 356.

(*d*) *Locke* v. *Matthews*, 13 C. B. N. S. 753.

(*e*) *Price* v. *Price*, 9 Bing. 356.

(*f*) *Daniels* v. *Davis*, 16 Ves. 252.

(*g*) *Hogan* v. *Hand*, 14 M. P. C. C., 9 W. R. 673; *Souster* v. *Pinhorn*, 8 Ex. 763; *Davies* v. *Thomas*, 6 Ex. 845; *Melling* v. *Leak*, 16 C. B. 652—669; *Clayton* v. *Blakey*, 2 Sm. L. C. 10th ed., 102—112, and cases there cited.

(*h*) *Peacock* v. *Peacock*, 16 Ves. 57.

(*i*) *Partridge* v. *Beere*, 5 B. & Al. 604; *Higginbotham* v. *Walton*, 4 M. & W. 415.

he is not a tenant at will (*k*), although he may become such by express stipulation (*l*). He is more in the position of a receiver, though he is not strictly that. His possession is that of the mortgagee (*m*). He may therefore be described as a tenant at sufferance (*n*). 3 & 4 Will. 4, c. 27, § 7. between mortgagor and mortgagee is not tenancy at will.

Even where a tenancy was expressly created, and a rent reserved by the mortgage deed, with a proviso that the mortgagee's right of eviction after default should not be affected, it was held that the mortgagor could be summarily ejected after default (*o*).

A mortgagor in possession may now sue in his own name, if the mortgagee has given no notice of his intention to take possession or enter into receipt of the rents and profits (*p*).

Of course, a tenant of a mortgagor, whose tenancy commences after the mortgage, is in no better position than his landlord. A tenant from year to year is, therefore, as respects the mortgagee, merely a tenant at sufferance, and may be ejected without notice (*q*). Tenant of mortgagor.

WHEN TIME RUNS—TENANCY FROM YEAR TO YEAR.

8. And be it further enacted,[1] **that when any person shall be in possession**[2] **or in receipt of the profits of any land, or in receipt of any rent,**[3] **as tenant from year to year**[5] **or other period, without any lease in writing,**[4] **the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent**[3] **payable in respect of such tenancy shall have been received**[6] **(which shall last happen).** 3 & 4 Will. 4, c. 27, § 8. Tenancy from year to year. When right accrues.

[1] This section is retrospective to this extent: that it applies to a tenancy from year to year, which existed *before and at the time of* the Retrospective.

(*k*) *Thorp* v. *Facey*, 35 L. J. (C. P.) 349; 1 Not. 5577.
(*l*) *Dixie* v. *Davies*, 7 Ex. 89.
(*m*) *Birch* v. *Wright*, 1 T. R. 378.
(*n*) *Roby* v. *Maisey*, 8 B. & C. 767.
(*o*) *Garrod* v. *Olley*, 12 Ad. & El. 481. See also *Snell* v. *Tom*, 4 Q. B. 615.
(*p*) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5).
(*q*) *Thunder* v. *Belcher*, 3 East. 449—451; *Lows* v. *Telford*, 1 Ap. Cas. 414—426. See also *Keech* v. *Hall*, 1 Sm. L. C., 7th ed., 579—597; and *Moss* v. *Gallimore*, 1 Sm. L. C., 7th ed., 629—643.

3 & 4 Will. 4, c. 27, § 8.

passing of the Act; and in respect of which rent has since been paid (*r*). In the case deciding this, *Evans* v. *Page* (decided under sect. 7), was referred to and distinguished.

Landlord and tenant.

[2] This section applies as between landlord and tenant as well as between owner and a third person (*s*).

Meaning of "rent."

[3] In the first part of this section the word rent means *rent charge*, or *rent of inheritance;* in the latter part *rent reserved* (*t*).

"Lease in writing."

[4] The case of a lease in writing is provided for by sect. 9 (*u*).

Where the only evidence of tenancy was a memorandum in a parish book to the effect that the churchwardens and overseers agreed to let a cottage to the defendant at 1*s.* 6*d.* per week, and that the defendant agreed to quit at a month's notice, it was held that such memorandum (which was signed by the defendant and two of the overseers, but not by either of the churchwardens) was not a "lease in writing" within the meaning of this section, and that the lessors were barred by twenty-five years' possession without payment of rent (*x*).

Distinction between § 7 and § 8 as regards accrual of right.

[5] A tenancy from year to year differs materially from a tenancy at will as regards the period from which time runs in favour of the tenant. In the case of a tenancy at will, it has been already stated that time runs from the end of the first year of the tenancy, or from the actual determination (whichever shall *first* happen). In the case of a tenancy from year to year, time runs from the end of the first year, or from the last payment of rent (whichever shall *last* happen).

Cases under this section.

The *legal* effect of payment of rent, after the expiration of a renewable lease is (or was before the Judicature Acts) to create a tenancy from year to year. But, in equity, the tenant has a right to the renewal of the lease, which right would now be recognized in any branch of the High Court. In such a case, if all the parties continue to act according to the terms of the original expired lease, the Court will consider the tenancy to be one under a renewed lease, and not a tenancy from year to year, and consequently this section would not apply (*y*).

[6] Where X. had declared, within twenty years of action brought, that he was paying rent to the owner, and it was proved that the person in possession had declared himself to be tenant to X., it was held that the owner was not barred (*z*).

Last pay-

A tenant from year to year paid rent up to May 1846. The

(*r*) *Jukes* v. *Sumner*, 14 M. & W. 39—41.
(*s*) *Baines* v. *Lumley*, 16 W. R. 674; 2 Not. 1504; *Lansdell* v. *Gower*, 17 Q. B. 589; 16 Jur. 100.
(*t*) *Angell* v. *Angell*, 9 Q. B. 356.
(*u*) *Infra*, p. 29.
(*x*) *Lansdell* v. *Gower*, 17 Q. B. 589; 16 Jur. 100.
(*y*) *Archbold* v. *Scully*, 9 H. L. C. 360—374.
(*z*) *Spencer* v. *Beckett*, 4 Q. B. 601.

landlord died in December 1846, and his representative brought ejectment in October 1866. Held that he was barred, as the case was within this section, and more than twenty years had elapsed since the last payment. To make the right accrue under sect. 3, at the time of the lessor's death, the plaintiff must have proved payment of rent in November 1846 (*a*). 3 & 4 Will. 4, c. 27, § 8. ment of rent.

It has already been observed that payment of rent for any aliquot proportion of a year raises a presumption of a tenancy from year to year. And in *Pope* v. *Garland* (*b*), ALDERSON, B., said, "A tenant at will *at a yearly rent* is a tenant from year to year."

Where the tenancy is disputed there ought to be strict proof that any payments by the alleged tenant were *in respect of rent* (*c*).

As to how a tenancy from year to year may be created, and when it will be presumed, see cases cited under sect. 7 (*d*). Creation of tenancy from year to year.

As to the effect of raising the rent of a tenant from year to year as constituting a new tenancy on the old terms, see *Monck* v. *Geikie* (*e*).

A tenancy from year to year may be determined in various ways, as to which the reader is referred to the cases mentioned below (*f*), and where lands and buildings were held (as is often the case in agricultural tenancies) from different dates, to *Williams* v. *Smith* (*g*). Termination of tenancy from year to year.

As to the effect of a disclaimer by a lessee of his lessor's title in determining a lease, see *Calvert* v. *Frowd* (*h*).

WHEN TIME RUNS—LEASE IN WRITING.

9. And be it further enacted,[1] that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any *rent*, by virtue of a lease in writing, by which a rent amounting to the yearly sum of 3 & 4 Will. 4, c. 27, § 9. Lease in writing.

(*a*) *Baines* v. *Lumley*, 16 W. R. 674; 2 Not. 1504.

(*b*) 4 Y. & C. 399.

(*c*) *Attorney-General* v. *Stephens*, 6 D. M. G. 111—146.

(*d*) P. 26, *ante*. See also *Baines* v. *Lumley*, 16 W. R. 674; *Martin* v *Watts*, 7 T. R. 86; *Clayton* v. *Blakey*, 8 T. R. 3; *Collins* v. *Weller*, 7 T. R. 478; *Daniel* v. *Gracie*, 6 Q. B. 145; *Bishop* v. *Howard*, 2 B. & C. 100—103; *Fenny* v. *Child*, 2 M. & S. 255; *Rogers* v. *Pullen*, 2 Bing. N. C. 749—754; *Tress* v. *Savage*, 4 El. & Bl. 36—43.

(*e*) 5 Q. B. 841.

(*f*) *Gray* v. *Stanion*, 1 M. & W. 695; *Clarke* v. *Smaridge*, 7 Q. B. 957; *Chadborn* v. *Green*, 6 Ad. & El. 658—661; *Robinson* v. *Dobell*, 1 Q. B. 806—808; *Lyster* v. *Goldwin*, 2 Q. B. 143—146; *Bessell* v. *Landsberg*, 7 Q. B. 638.

(*g*) 5 A. & E. 350.

(*h*) 1 Moo. & P. 486.

3 & 4 Will. 4, c. 27, § 9.

twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming [2] to be entitled [3] to such land or *rent* in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or *rent*, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Right accrues at time of wrongful receipt of rent by adverse claimant.

Retrospective.

[1] This section is retrospective, so as to include cases in which wrongful receipt of rent has commenced before *and been continued since* the passing of the Act. This was laid down in a case (*i*) in which *Evans* v. *Page* (*ante*, p. 24) was distinguished, and *Jukes* v. *Sumner* (*ante*, p. 28) followed. But the plaintiff was held, under the circumstances, to be protected by sect. 15 (*infra*, p. 39).

"Rent" in this section has two meanings.

"We now come to the 9th sect., on which this case turns. The word 'rent' is there used seven times. The first time it means *rent charge;* the second and third, *rent reserved;* the fourth, *rent charge;* the fifth, *rent reserved;* the sixth, *rent charge;* the seventh, *rent reserved.*" *Per* LORD DENMAN, C. J. (*k*).

This section must be specially pleaded to exclude § 3.

Defendants who set up the statute must allege and prove wrongful payment of rent under this section, if the property has been subject to a lease which expired within twenty years before action brought. Otherwise, sect. 3 will apply, and time will not commence to run until the expiration of the lease, although the defendants may have been in actual possession without payment of rent for more than twenty years (*l*). See cases cited under sect. 3 (*ante* p. 13).

And unless the facts pleaded show the receipt of rent to have been,

(*i*) *Angell* v. *Angell*, 9 Q. B. 328—358—9.

(*k*) *Angell* v. *Angell*, 9 Q. B. 321—355.

(*l*) *Chadwick* v. *Broadwood*, 3 B. 308—316.

in fact, adverse, it was necessary for a person pleading the statute, and relying on this section under the old practice, to allege specifically that the receipt was "wrongful" or "adverse" (*m*). 3 & 4 Will. 4, c. 27, § 9

Pleading this section.

[3] Payment of rent under this section must be *to a third person* wrongfully claiming. A lessee cannot, by mere non-payment, place himself during the term in the position of such third person, even though he may claim the fee. In such a case time will not run against the lessor till the expiration of the term (*n*). See also cases cited under sect. 3 (p. 13, *ante*).

Mere non-payment is not wrongful receipt of rent.

"*Received* . . . . *wrongfully* requires receipt, not merely by a stranger, but by a person under a claim of title, and that a wrongful one. The mere fact that rent was received and kept by a person other than the right owner no doubt raises a presumption that it was received under a wrongful claim of title; and that is only a presumption, and may be negatived by the circumstances. . . . There may be a wrongful claim to a rent reserved on a lease of land which would not be a wrongful claim of title to the land." *Per* WALSH, M. R. (*Ireland*) (*o*).

What is wrongful receipt of rent.

Receipt by a person under a supposed title, consistent with that of of the rightful owner in reversion, is not wrongful receipt (*p*), but it is otherwise when a person claims an *inconsistent* title by mistake (*q*).

Receipt under supposed title consistent with owner's is not "wrongful."

Therefore, where a widow who was entitled to a jointure out of lands to which her children were entitled, subject to such jointure, received the entire rent (which exceeded her jointure) during her life, it was held that the statute did not run against her children from the first receipt, but from her death (*r*).

But where a mother, by mistake, claimed the fee-simple in land to which her son was entitled as tenant in tail, time was held to run from the first receipt of rent by her (*s*). The same case is an authority for the proposition that the receipt of an agent is that of his principal. The rents were, in fact, received by the son for eighteen years, and paid over by him to his mother, under the impression that she was entitled to the fee-simple. He then died, and the mother continued to receive the rents personally for three years. It was held that, though the son himself was actually entitled, he had acted as the agent of his mother, and his heir was barred (*t*).

Receipt of agent is receipt of principal though agent may be lawful owner.

(*m*) *Sloane* v. *Flood*, 5. I. C. L. R. 75.

(*n*) *Archbold* v. *Scully*, 10 H. L. C. 360—380—1.

(*o*) *Shaw* v. *Keighron*, I. R. 3 Eq. 574.

(*p*) *Ibid.*

(*q*) *Williams* v. *Pott*, L. R. 12 Eq. 149; 2 Not. 4171.

(*r*) *Shaw* v. *Keighron*, I. R. 3 Eq. 574.

(*s*) *Williams* v. *Pott*, L. R. 12 Eq. 149.

(*t*) *Ibid.*

3 & 4 Will. 4, c. 27, § 9.

It is a question whether payment of rent by a sub-lessee to the owner in fee is a wrongful payment within this section so as to bar the intermediate lessee (*u*).

Payment by sub-lessee to owner in fee.

If a landlord induces his tenant to pay rent to another person (*x*), or if a tenant does any act contrary to his landlord's title, such as admitting the title of another (*y*), or setting up a hostile title in himself, or giving possession to another person in order to enable him to set up a hostile title (*z*), the term is thereupon forfeited and the statute begins to run against the landlord; such an act being a disclaimer of the landlord's title. But it must be shown that the landlord knew of such wrongful act (*a*).

Disclaimer by lessee of lessor's title may determine lease.

What is such disclaimer.

A mere verbal refusal to pay rent on demand, on the ground that the tenant claims the fee, will not forfeit a definite term under a lease, though it might a tenancy from year to year (*b*). This decision reconciles the doctrine of disclaimer with the principles laid down in *Archbold* v. *Scully* (*c*), *Davey* v. *Oxenham* (*d*), and similar cases.

On the question of what amounts to a disclaimer there are several decisions which it is unnecessary further to discuss (*e*).

MERE ENTRY NOT POSSESSION.

3 & 4 Will. 4, c. 27, § 10.

10. [1] And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry [2] thereon.

Mere entry not to be deemed possession.

What interrupts adverse possession.

[1] This section and sect. 11 should be read together (*f*).

[2] Formerly a mere entry, if with a view of claiming the land, would give the true owner a right to bring ejectment within a given time after such entry. But now, in order to interrupt an adverse posses-

(*u*) *Drew* v. *Lord Norbury*, 3 Jo. & La. T. 267; *Hayes* v. *Woodley*, 3 Ir. Ch. R. 142—150.

(*x*) *Downs* v *Cooper*, 2 Q. B. 256.

(*y*) *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 624—5.

(*z*) *Ellerbrock* v. *Flynn*, 1 Cr. M. & R. 137.

(*a*) *Meredith* v. *Gilpin*, 6 Price, 146—153.

(*b*) *Graves* v. *Wills*, 10 A. & E. 427—436.

(*c*) 10 H. L. C. 380—1.

(*d*) 7 M. & W. 560.

(*e*) *Gray* v. *Stanion*, 1 M. & W. 695; *Williams* v. *Cooper*, 1 Man. & Gr. 135; *Williams* v. *Pasquali*, Peake, N. P. C. 196; *Meredith* v. *Gilpin*, 6 Price, 146—153; *Fenner* v. *Diplock*, 9 Moo. 38.

(*f*) *Baker* v. *Coombes*, 9 C. B. 718.

sion, so that the statute will cease to run, such an entry is not sufficient; there must be an actual taking possession by the true owner. Even an entry accompanied by acts of ownership, such as the removal of a stone from a wall, or the pulling down of a fence, is not a sufficient resumption of possession (*g*). 3 & 4 Will. 4, c. 27, § 10.

This section probably applies to all cases of adverse possession; but from the cases cited under sect. 7 (*h*), it may be gathered that an entry which would be insufficient in the case of adverse possession, may nevertheless be a sufficient resumption of possession to determine a tenancy at will. Entry determines tenancy at will.

As to whether a person in possession is a tenant at will or a tenant at sufferance, see the cases cited under sect. 7 (*h*).

CONTINUAL CLAIM.

11. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. 3 & 4 Will. 4, c. 27, § 11. Continual claim not to preserve right.

Continual claim was a formal entry, or (in case of resistance) claim to enter, with a declaration that such entry was for the purpose of taking possession. A mere demand by a mortgagor *for an account* was not equivalent to an entry (*i*).

JOINT TENANTS, &c.

12. [1] And be it further enacted,[2] that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety,[3] or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or 3 & 4 Will. 4, c. 27, § 12. Possession of joint owners, may be adverse to

(*g*) *Baker* v. *Coombes*, 9 C. B. 718.

(*h*) *Ante*, p. 26. See also *Randall* v. *Stevens*, 2 El. & Bl. 641; *Brassington* v. *Llewellyn*, 27 L. J. N. S. Ex. 297.

(*i*) *Hodle* v. *Healey*, 1 V. & B. 536—540.

3 & 4 Will. 4, c. 27, § 12. each other under this Act.

their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.[4]

Old law. Possession not adverse.

[1] The old law on this subject is thus laid down in Burton's Real Property (*k*). "It has been mentioned that the fine of a joint tenant or tenant in common (and consequently that of a coparcener) though purporting to comprise the whole land, will not of itself affect the estate of the conusor's companion, nor will his simply taking all the profits of the land without accounting to his companion, constitute such an *adverse possession* as by lapse of time will make the claims of the latter unavailable. If nothing further has been done to his prejudice he must be considered as still in possession."

Sect. 12 is retrospective.

[2] This section is retrospective and makes the possession of all coparceners, tenants in common, and joint tenants separate, not merely from the passing of the Act, but from the time when their joint estate commenced (*l*). From this it would appear that if a joint tenant had been in possession of the whole of the land subject to the joint tenancy for twenty years before the passing of the Act, the other joint tenants might have been absolutely barred before the Act came into operation, if they were not protected by sect. 15. But it was held that such a possession was not "adverse" previously to the passing of the Act, although it became so immediately afterwards (*m*), and that sect. 15 therefore gave the excluded joint tenants the right to bring an action within five years, after which time they would be absolutely barred (*n*).

Possession becomes adverse from passing of Act only.

Possession of entirety of any portion.

[3] This section applies to cases in which a joint tenant has been in possession of the entirety of *any portion* of the land in which he is entitled to an undivided share. Possession of the entirety of *the whole* of such lands is unnecessary; and it is immaterial whether the portion of the entirety of which he is in possession is of greater or less value than his undivided share of the whole (*o*).

[4] Actual enjoyment for twenty years, contrary to a plaintiff's right,

(*k*) 5th ed., pp. 161—2.
(*l*) *Holt* v. *Horrocks*, 1 Car. & Kir. 566; *Culley* v. *Taylerson*, 11 A. & E. 1008.
(*m*) *O'Sullivan* v *M'Swiney*, 2 Ir. L. R. 95; Long. & Town, 111—119.
(*n*) *Culley* v. *Taylerson*, 11 Ad. & El. 1008.
(*o*) *Murphy* v. *Murphy*, 15 I. C. L. R. 205, 1 Not. 4206.

is a clear bar under the statute (*p*). Therefore where four of five equitable tenants in common in fee had been in actual possession of the entirety for more than twenty years to the exclusion of their co-tenant, he was held to be barred (*q*). 3 & 4 Will. 4, c. 27, § 12.

Two persons were in possession, for more than twenty years, of the entirety of property, to two undivided third parts of which they were entitled. On the death of one of them, the survivor was held to be entitled for his own benefit to the one-third to which they had acquired title under the Act (*r*)

Questions bearing upon this section also arose in other cases, to which references are given below (*s*).

YOUNGER BROTHER'S POSSESSION.

13. And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir. [1] 3 & 4 Will. 4, c. 27, § 13.

Possession of younger brother or other relation may be adverse to heir.

[1] Formerly the possession of a younger brother or other relation of an heir was, in many cases, not considered adverse, and time would not run against the heir during such possession. But the passing of this Act rendered such possession adverse for the future, although sect. 15 would give a saving of five years, as in the case of joint owners (*a*). Even before this Act there were cases in which the unexplained possession of a relation was considered adverse to the heir (*b*). Old law.

(*p*) Sect. 34, *infra*, p. 77; *Incorporated Society* v. *Richards*, 1 Dr. & War. 289.

(*q*) *Burroughs* v. *M'Creight*, 1 Jo. & La. T. 290—303. See also *Williams* v. *Williams*, L. R. 2 Ch. 294—301; 1 Not. 5935.

(*r*) *Ward* v. *Ward*, L. R. 6 Ch. 789; 2 Not. 3698.

(*s*) *M'Mahon* v. *Burchell*, 2 Phil. C. C. 127; *Henderson* v. *Eason*, 7 C. B. 303—306; *Ley* v. *Peter*, 3 H. & N. 101.

(*a*) *Jones* v. *Jones*, 16 M. & W. 699-712.

(*b*) *Draper* v. *Lawley*, 13 Q. B. 954. See also *Thomas* v. *Thomas*, cited p. 41 *infra*.

ACKNOWLEDGMENT OF TITLE.

3 & 4 Will. 4, c. 27, **§ 14.**

14. Provided always, and be it further enacted, that when any acknowledgment[1] of the title of the person entitled to any land or rent[2] shall have been given to him or his agent in writing, signed by the person in possession[3] or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment[4] shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

Acknowledgment of title to be equivalent to right of entry.

[1] "The moment after a man signs an acknowledgment, the time begins to run against the person to whom the acknowledgment is made." *Per* LORD ST. LEONARDS (*c*).

Acknowledgment question for court if question of construction; but for jury if of intention.

[2] The question whether what has been done amounts to an acknowledgment under this section is, in some cases, a question for the court, and in others for the jury, to decide. If it turns on the mere *construction* of a written document, it is for the court: if it is a question of the *intention* of the parties, it is for the jury; and it is immaterial whether such intention is to be gathered from a series of letters or from a written document explained by parol evidence (*d*).

Acknowledgment by agent not sufficient.

[3] It will be observed that this section requires an acknowledgment to be signed by the person in possession, and accordingly, although it may be given to the agent of the person entitled, an acknowledgment signed by the agent of the person in possession is of no avail (*e*). It

(*c*) *Burroughs* v. *M'Creight*, 1 Jo. & La. T. 304. See also *Scott* v. *Nixon*, 3 Dru. & War. 404.

(*d*) *Morrell* v. *Frith*, 3 M. & W. 402—404-5; *Curzon* v. *Edwards*, 6 M. & W. 295—302; *Incorporated Society of Dublin* v. *Richards*, 1 Dru. & War. 258—290.

(*e*) *Ley* v. *Peter*, 6 W. R. 437—438; 3 H. & N. 110—111.

8 & 4 Will. 4, c. 27, § 14.

should, however, be observed, that in the case in question the document relied upon as an acknowledgment did not purport to be signed as agent for, or with the authority of, the alleged principal. On the other hand, where an acknowledgment was signed by an agent by the direction *and in the presence* of the person in possession, it was held that there was sufficient evidence of acknowledgment to go before a jury, such a signature being presumably equivalent to signature under a power of attorney (*f*).

Acknowledgments under §§ 14, 28, 40, 42.

The cases on acknowledgments under sects. 28, 40, and 42 (*g*) may be profitably compared with those cited under this section. It will be observed that, in all cases, an acknowledgment *to* the agent of the owner is sufficient; but under the present section and sect. 28 it must be given *by* the person in possession and not by his agent, while, under sects. 40 and 42, it may be given *by* as well as *to* an agent.

What amounts to an acknowledgment.

Letter claiming adverse title.

"Where negotiations for a tenancy were pending between a person who claimed to be entitled to land and another who was in adverse possession, the following letter from the latter to the steward of the former was held not to amount to an acknowledgment:—

"Dear Sir,—Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have at length made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a a term of twenty-one years." The negotiations subsequently fell through (*h*).

Correspondence casting doubt on title.

Where the person in possession knew that the title of the claimants was doubtful, and himself claimed an incumbrance on the property as against the claimants in case their title might be good, and these facts appeared from a long correspondence, which resulted in an agreement (which was never executed) to refer the claims of the parties to arbitration, such correspondence was held to amount to an acknowledgment within this section (*i*).

Series of letters admitting tenancy.

Letters from an occupier to a claimant of land, containing the following expressions, were held to amount to an acknowledgment: "I wish an arrangement to be made on reasonable terms, and due consideration and compensation to be made."—"I was involved in law from 1805 to 1816 concerning Four Lords' Land, which has given me great trouble and expense; and with respect to the expenses, it is reasonable that the lords of the fee should make me some recompense accordingly."—"It appears reasonable that Mr. F. should vin-

(*f*) *Corporation of Dublin* v. *Judge*, 11 I. L. R. 8; *Earl Spencer* v. *Beckett*, 4 Q. B. 601.
(*g*) Pp. 71, 89, and 98, *infra*.
(*h*) *Curzon* v. *Edmonds*, 6 M. & W. 295—299.
(*i*) *Incorporated Society of Dublin* v. *Richards*, 1 Dru. & War. 258—290.

3 & 4 Will. 4, c. 27, § 14.

dicate his right to the land rather than that the expenses should fall upon the tenants, and I beg compassion, mercy, and pity, and recompense in a satisfactory manner." The court considered the letter speaking of litigation from 1805 to 1816 alone, an admission that rent was due, as it was written in answer to a demand for rent. In the same case, the question arose whether a parol statement by a deceased rent collector that he had received rent from the defendant was evidence of the landlord's title against the defendant, but it was unnecessary to decide it. (*k*).

Parol evidence as to payment of rent.

Deed operates from execution.

A mortgage deed, dated in 1827 but actually executed in 1834, under which no interest was paid until ejectment was brought in 1854, was held to be a sufficient acknowledgment of the mortgagor's title *at the time of execution*. For this purpose the deed must be considered as speaking from the time of actual execution, and not from the time of its date (*l*).

Letter from agent to agent.

Where a defendant and his predecessors in title had been in possession of the entirety of land to which they and the plaintiff were entitled as tenants in common, a letter from the defendant's land agent to the plaintiff's agent containing the following words was held not to be an acknowledgment within this section, although written less than twenty years before the action: "Mr. J. T. H. Peter is now in possession of his two-thirds of the meadow referred to by you, who will no doubt accept a lease (three lives) for Ley's one-third at a fair rack rent. You must be aware that Mr. Peter, junior, is not bound to pay rent for Ley's one-third during the time his father held the meadow, but no doubt he will do so in case you agree for a lease." Even had the letter, in itself, amounted to an acknowledgment, BRAMWELL, WATSON, and CHANNELL, BB. were of opinion that it would not have been admissible in evidence against the defendant, while MARTIN, B. entertained no doubt that it would (*m*).

Answer in Chancery.

An answer in a Chancery suit, admitting the plaintiff's title, was held a sufficient acknowledgment to bind a person claiming under the person who filed the answer (*n*).

Inscription on wall.

It appears that an inscription upon a stone, built into a boundary wall, stating the name of the builder and that the wall is his property, may amount to a perpetual acknowledgment (*o*).

(*k*) *Fursdon* v. *Clogg*, 10 M. & W. 572.

(*l*) *Jayne* v. *Hughes*, 10 Ex. 430—433.

(*m*) *Ley* v. *Peter*, 3 H. & N. 101.

(*n*) *Goode* v. *Job*, 1 El. & El. 6.

(*o*) *Phillipson* v. *Gibbon*, L. R. 6 Ch. 428—434; 2 Not. 3637.

SAVING TILL 1838 IN CERTAIN CASES.

3 & 4 Will. 4, c. 27, § 15.

Saving of five years in cases where possession not adverse to person entitled at passing of Act.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest,[1] at any time within five years next after the passing of this Act.[2]

[1] *Semble* that the word "interest" in this section, though on the Parliament roll, is a clerical error, and should have been "rent." *Per* LORD DENMAN, C. J. (*p*).

Effect of this section.

[2] This section mitigates the hardship which might otherwise have been caused by the retrospective effect of certain sections of the Act in barring the title of a claimant whose right of entry had been deemed to accrue more than twenty years before the passing of the Act. In order to avail himself of the protection of this section, however, a claimant was obliged to prove (*α*) that no acknowledgment had been made within twenty years before, (*β*) that possession was not adverse to him immediately before the passing of the Act. This section applied, although the Act might itself render possession adverse for the future (*q*).

This section is now of so little practical importance that it is unnecessary to consider the difference between adverse possession previously and subsequently to the passing of the Act. Some remarks upon that point will, however, be found in the notes to sect. 3 (*r*).

(*p*) *Angell* v. *Angell*, 9 Q. B. 360.

(*q*) *Holmes* v. *Newlands*, 11 A. & E. 44—51; *Culley* v. *Taylerson*, 11 A. & E. 1008—1018. See also remarks of PATTESON, J. in *Jones* v. *Williams*, 5 A. & E. 291.

(*r*) *Ante*, pp. 11 and 12.

SAVING FOR DISABILITIES.

3 & 4 Will. 4, c. 27, § 16.

Saving in case of certain disabilities. Ten years further time till 1st Jan., 1879.

16.[1] Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas,[2] then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

[1] This is one of the sections repealed as from 1st Jan., 1879, by the Act of 1874 (37 & 38 Vict. c. 57).

[2] It will be seen, however, that it is substantially re-enacted as sect. 3 of the last-mentioned Act, with the necessary substitution of the new periods of limitation, viz. twelve and six years for the old periods of twenty and ten years, and the omission of "absence beyond seas" as a disability. By sect. 4 of the Act of 1874, the saving which formerly existed in case of such absence is expressly taken away. This provision places actions for the recovery of real and personal estate upon the same footing in this respect.

37 & 38 Vict. c. 57, § 3.

Afterwards only six years.

3.[1] If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities[2] hereinafter mentioned (that is to say), infancy,[3] coverture, idiotcy, lunacy,[4] or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years (as the case may be), hereinbefore limited, shall

have expired, make an entry or distress, or bring an action or suit to recover such land or rent at any time within six years next after the time at which the person to whom such right shall first have accrued[5] shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened). 3 & 4 Will. 4, c. 27, § 16. 37 & 38 Vict. c. 57, §§ 3, 4.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims. 37 & 38 Vict. c. 57, § 4. Absence beyond seas not to be a disability in future.

[1] The following decisions under sect. 16 of the Act of 1833 will be equally applicable, *mutatis mutandis*, to sect. 3 of the Act of 1874.

[2] In a case under sect. 22 (*s*), it was held that where time had commenced to run against a tenant in tail, it continued to run against his heiress in tail after his death, although she was under disability, and that she did not come within the provision of sect. 16 (*t*). Heirs in tail.

[3] As regards infants, the provisions of these sections only come into operation when the possession of some other person, during the disability, has been adverse. In other cases time does not begin to run, under sect. 2 until the infant attains twenty-one, and he therefore has the full time of twenty [or twelve] years, instead of the ten [or six] years limited by these sections, from his majority, within which to bring an action. As to what is adverse possession, see sect. 3 of 3 & 4 Wm. 4, c. 27, *ante*, pp. 11 and 12. Where a father entered and received the rents and profits of land to which his infant son was entitled, it was held that he so entered as the guardian of the infant, and that his possession was therefore not adverse. This decision was grounded on the principle before-mentioned, that possession which can be referred to a lawful title is never considered adverse (*u*). In the same case a distinction was drawn by LORD HATHERLEY between possession by a guardian and possession by a stranger. Either may be treated by an infant as his bailiff for the purpose of enforcing an account of the rents and profits (*x*); but the possession of a mere Infancy.

(*s*) *Infra*, p. 48.
(*t*) *Goodall* v. *Skerratt*, 3 Drew. 216.
(*u*) *Thomas* v. *Thomas*, 2 K. & J. 79—84.
(*x*) *Blomfield* v. *Eyre*, 8 B. 250—258; *Wyllie* v. *Ellice*, 6 H. 505; *Morgan* v. *Morgan*, 1 Atk. 489.

3 & 4 Will. 4, c. 27, § 16. 37 & 38 Vict. c. 57, §§ 3, 4.

stranger would be considered sufficiently adverse to bring the sections under discussion into operation instead of sect. 2 of 3 & 4 Wm. 4, c. 27, and so give the infant only ten [or six] years after attaining his majority within which to make a claim. The case above referred to was observed upon and substantially followed by STUART, V.-C. (*y*) whose decision was affirmed on appeal (TURNER L. J. *dubitante*) (*z*), in a case where the possession of the uncle of an infant (who was also her nearest male relative and the executor of her father's will) was held not adverse. It should, however, be remarked, that he had applied the rents and profits in keeping down the interest on a mortgage affecting the property.

Lunacy.

[4] In an Irish case (*a*) it was held that a lease for lives with a covenant for perpetual renewal by a lunatic was void, and that the heir of the lessee had not acquired the fee-simple, although the lessee held under the lease, and a confirmation thereof by the committee of the lunatic, from 1787 to his death in 1836 (upon which the term ended), and his heir then received the rents and profits till 1842.

[5] As to the distinction between the time when a right of entry is "deemed to accrue" under sects. 2 and 3 of the Act of 1833, and the time when such right actually accrues in certain cases, and the hardship wrought by the failure of sect. 16 to give protection to a person who falls under disability after the right is "deemed" to accrue but before such right can be exercised, the remarks of PARKE, B. (*b*) and PATTESON, J. (*c*) are worthy of attentive perusal. It is remarkable that the Act of 1874 contains no provision calculated to remove this hardship.

Successive disabilities.

Where successive disabilities in the same person occur without any interval, such person has ten [or six] years from the termination of the last disability, within which to bring an action. In a recent case in the Court of Exchequer (*d*), where a female infant married, MARTIN, B. said, "The party never at any time being free from disability, the disability, though due to different causes, must be looked upon as one continued thing." This view appears to be confirmed by the reference to "one or more of such disabilities" in sect. 17 of 3 & 4 Wm. 4, c. 27, and sect. 5 of 37 & 38 Vict. c. 57, and is, of course, subject to the provisions of those sections, in case the ten [or six] years above mentioned exceed forty [or thirty] years from the commencement of the first disability (*e*).

(*y*) *Pelly* v. *Bascombe*, 4 Giff. 390—395.

(*z*) 16 W. R. 306; 34 L. J. (Ch.) 227.

(*a*) *Fulton* v. *Creagh*, 3 Jo. & La. T. 329. See also cases cited under sect. 24, *infra*, p. 52.

(*b*) *Owen* v. *De Beauvoir*, 16 M. & W. 567.

(*c*) *De Beauvoir* v. *Owen*, 5 Ex. 179—182.

(*d*) *Barrows* v. *Ellison*, L. R. 6 Ex. 128.

(*e*) See next page, and also *Supple* v. *Raymond*, Hayes, 6.

DISABILITIES—EXTREME SAVING.

3 & 4 Will. 4, c. 27, § 17.

Extreme period of limitation in case of disabilities not to exceed forty years in actions brought before 1st Jan., 1879,

17. Provided nevertheless, and be it further enacted, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. [1]

[1] This section is repealed from the 1st of January, 1879, by sect. 9 of the Act of 1874, the following section of which will replace it from that date.

37 & 38 Vict. c. 57, § 5.

and thirty years in subsequent actions.

5. No entry, distress, action, or suit [1] shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty [1] [2] years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty [1] years, or although the term of six [1] years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. [3]

[1] The new section merely inserts the word "suit" after "action" as to which see notes to sect. 1 of the Act of 1874 (*f*), and substi-

Effect of new section.

(*f*) P. 3, *ante*.

3 & 4 Will. 4, c. 27, § 17. 37 & 38 Vict. c. 57, § 5.

tutes thirty years and six years respectively for the forty years and ten years given by the Act of 3 & 4 Wm. 4, c. 27.

Relation between extreme period of limitation and length of title required on a sale.

[1] It appears to have been thought by LORD ST. LEONARDS, and other eminent authorities, that the effect of fixing forty years as the extreme period to be allowed to persons under disability would have the effect of diminishing "the length of abstracts," and that a forty years' title would be accepted by conveyancers instead of the sixty years' title upon which they had previously insisted. That such has been the practical effect of the provision, in many instances, can scarcely be doubted; but in 1844, it was decided by LORD LYNDHURST, C., that the rule requiring a sixty years' title remained unaffected by this statute, one ground of that rule being the duration of human life (*g*). The same view has been taken by several conveyancers of eminence; and although a shorter period has often been accepted as a good holding title, the right of a purchaser on an open contract to a clear sixty years' title was maintained by the Court of Chancery until the end of 1874. It is, however, a significant comment upon the opinion of LORD LYNDHURST, that the Legislature has, almost simultaneously with the enactment reducing the extreme period of limitation to thirty years, limited a purchaser's right to the forty years, which LORD ST. LEONARDS, nearly forty years ago, considered a sufficient title (*h*).

[2] Where a husband, seized in right of his wife, conveyed the estate without her concurrence, SHADWELL, V.-C. held the case not to be within sect. 17, and that the effect of such a conveyance was only to pass the legal estate which the husband had during the coverture. A right of action would therefore accrue to the wife or her heir, under the portion of sect. 3 relating to future estates, upon the termination of the coverture, although a person might have been in possession under such conveyance more than forty years (*i*).

SUCCESSIVE DISABILITIES.

3 & 4 Will. 4, c. 27, § 18.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to

(*g*) *Cooper* v. *Emery*, 1 Phil. 389.

(*h*) 37 & 38 Vict. c. 78, sect. 1 (p. 109 *infra*).

(*i*) *Jumpsen* v. *Pitchers*, 13 Sim. 327—332. See also *Fulton* v. *Creagh*, 3 Jo. & La. T. 329 (cited under sect. 16, *ante*), and compare *Corbyn* v. *Bramston*, 3 A. & E. 63 (cited under sect. 3, *ante*), and *Roffey* v. *Harbrow*, 3 A. & E. 67.

3 & 4 Will. 4, c. 27, § 18.

Successive disabilities. No further time to be allowed for successive disabilities in different persons.

make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty [1] years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten [1] years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person. [2]

[1] This section is to be read after the 1st of January, 1879, as if the term of six years had been mentioned instead of the term of ten years, and as if the term of twelve years had been mentioned instead of the term of twenty years (*k*).

[2] Sect. 16 deals with disabilities in the same person, whether successive or not: the present section provides that where successive disabilities occur in different persons, the last of such persons shall have no further time than that limited by sect. 16, on account of his disability immediately succeeding the prior one in his predecessor. It is retrospective so far as to include among "successive disabilities" the disability of a person whose right of action accrued, and who died, before the passing of the Act. This was laid down in a case under sect. 16 (*l*), on appeal from the colony of New South Wales, where the statute had been adopted.

How far sect. 18 is retrospective.

3 & 4 Will. 4, c. 27, § 19.

Definition of "beyond seas."

19. And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act.

This section will be practically unimportant in future, as absence beyond seas will cease to be a disability after the 1st of January, 1879 (*m*).

(*k*) 37 & 38 Vict. c. 57, sect. 9, p. 119, *infra*.

(*l*) *Devine* v. *Holloway*, 14 M. P. C. C. 290.

(*m*) 37 & 38 Vict. c. 57, sect. 4 (*ante*, p. 41).

3 & 4 Will. 4, c. 27, § 20.

20. And be it further enacted,[1] that when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder,[2] or otherwise,[3] in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.[4]

Where one estate is barred, all future estates of the same person in the same land shall be barred unless it has been held by another person for an intermediate estate.

[1] This section should be carefully compared with the last clause of sect. 3 of the Act of 1833, sect. 5 of the same Act, and sect. 2 of the Act of 1874. The effect of the three sections is fully considered in the notes to the last-mentioned section (pp. 21, 22 *ante*) and may be summed up as follows:—Time runs against a reversioner from the time when his reversion falls into possession. But if he was the owner of a prior particular estate in the same land, which has been barred, his reversion will also be barred, unless some person claiming an intermediate estate has been in possession. After 1879, if time has begun to run against the owner of a particular estate, the reversion will be barred in twelve years from when time so began to run, or in six years from the time when his reversion falls into possession.

[2] X. was entitled, as heir of A., to a lease for lives, which expired in 1835. He was also entitled, as heir of B., to the reversion in fee, expectant on the determination of the lease of the same property. His right to the lease accrued on the death of B. in 1812, but B.'s widow remained in possession till 1843. Held that X. was barred under this section, and that no new right of entry accrued to him on the determination of the term in 1835 (*n*).

Successive rights of entry in respect of

[3] This section applies to cases where the same person has successive rights of entry in respect of the happening of different events. Land was devised to A. with a proviso that if he "took up" with a

(*n*) *Hall* v. *Moulsdale*, 16 M. & W. 689—698.

Roman Catholic, or died without lawful issue, it should go over to B. B. brought ejectment more than twenty years after the happening of the first event, but within twenty years of the second; and it was held that he was barred by allowing twenty years to elapse from the time when his right first accrued (*o*). It is difficult to reconcile this decision with the rule that no one need take advantage of a forfeiture. See 3 & 4 Wm. 4, c. 27, sect. 4. (*p*). 3 & 4 Will. 4, c. 27, **§ 20.** the same estate.

[4] Where copyholds were surrendered to the use of A. and his wife for their lives, with remainder to the husband, and the husband went abroad in 1805 and became bankrupt in 1807, when an assignment in the then usual form was made to his assignee, after which the wife remained in possession till her death in 1841, the question arose whether the husband's remainder was within this section or sect. 3 of 3 & 4 Wm. 4, c. 27; and the court considered it to be within sect. 3, and held an ejectment by the assignee, after the wife's death, in time. Even if the case had been within this section, the possession of the wife would have amounted to a recovery by her in respect of an estate limited to take effect after or in defeasance of the husband's prior life estate, the determination of which would give the assignee a new right of entry (*q*).

TENANTS IN TAIL.

21. [1] And be it further enacted,[2] that when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred[3] by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case,[4] no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred. 3 & 4 Will. 4, c. 27, **§ 21.** Where time has run out against a tenant in tail, remainderman whom he might have barred shall be excluded.

[1] This is an exception from the rule as to future estates laid down in sect. 3 of the Act of 1833, and sect. 2 of the Act of 1874.

[2] This section and sect. 22 appear to have a retrospective operation (*r*). Retrospective.

(*o*) *Clarke* v. *Clarke*, I. R. 2 C. L. 395.

(*p*) *Ante*, pp. 17, 18.

(*q*) *Johnson* v. *Liversedge*, 11 M. & W. 517—525.

(*r*) *Austin* v. *Llewellyn*, 9 Ex. 277; *Goodall* v. *Skerratt*, 3 Drew. 220.

3 & 4 Will. 4, c. 27, **§ 21.**

Section 21 has effect of a disentailing deed.

[3] "If a tenant in tail remains out of possession for twenty [or twelve] years, his neglect bars the issue in tail the same as if he had executed a disentailing deed and conveyed away the estate."—*Per* ALDERSON, B. A tenant in tail became entitled, and entered into possession in 1799, from which date he received the rents and profits till 1807. He died in 1850, without having resumed possession. Held that the heir in tail was barred (*s*).

Possession under conveyance in fee by tenant in tail does not bar heir in tail.

[4] A feoffment by a tenant in tail, which would not bar the heir in tail independently of the statute, does not bar him under this section; his rights are preserved by sect. 38 (*t*). The following remarks upon this point were made by PARKE, B. in 1852: "The 21st section applies to the case where the right of entry of a tenant in tail is barred *by his neglect* to make such entry in proper time, not to the case where he has conveyed away his right to another and put it out of his power to enter. In the latter case, the right of entry is not barred by reason of the same not being made within the period limited, but by reason of his not being able to enter against his own conveyance" (*u*).

[5] BRAMWELL, B. in a recent case, observed upon this section as follows: "Sect. 21 means that the owners of all such estates in remainder, as are of such a nature that an ordinary tenant could bar them, shall lose their title by lapse of twenty years, with no possession by tenant in tail" (*x*). The defendant was lessee of land subject to an inalienable statutory tenancy in tail. His lease expired in 1832, and he held over till 1872, when the heir in tail brought ejectment, and it was held that he was not barred by the statute. In the same case the point was raised whether the section of the Act of 1833 barring a tenant in tail is sect. 2 or sect. 21; and the opinion of the court was that sects. 1 and 2 would bar a tenant in tail *in possession*, and that sect. 21 applied to estates *in remainder or reversion* only (*y*).

TENANTS IN TAIL.

3 & 4 Will. 4, c. 27, **§ 22.**

Where time has begun to run against a tenant in tail, it

22. And be it further enacted,[1] that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for

(*s*) *Austin* v. *Llewellyn*, 9 Ex. 276.
(*t*) *Infra*, p. 82.
(*u*) *Rimmington* v. *Cannon*, 12 C. B. 34. See notes to sect. 23 (*infra*, p. 51).
(*x*) *Earl of Abergavenny* v. *Brace*, L. R. 7 Ex. 173; 2 Not. 4596.
(*y*) L. R. 7 Ex. 154—171.

making an entry or distress, or bringing an action to recover such land or rent, no person[2] claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action.

3 & 4 Will. 4, c. 27, § 22.

shall be deemed to have run also against remaindermen whom he might have barred.

[1] "The intention and operation of these sections (21 and 22) were to put remaindermen, whose estates might be barred by the tenant in tail, in the same position as if they claimed under tenants in tail; that is, the act of the tenant in tail in allowing any portion of the twenty years to run without making an entry or bringing an action, to the extent of the period allowed to elapse, binds the remainderman." *Per* KINDERSLEY, V.-C. (*z*).

Effect of §§ 21 and 22 as to estates in remainder.

[2] When time has commenced to run against a tenant in tail, it continues to run against the heir in tail, although he may be under disability (*a*).

23.[1] And be it further enacted,[2] that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail[3] shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if

3 & 4 Will. 4, c. 27, § 23.

Under an assurance by tenant in tail which does not bar remainders time runs against remaindermen from when such tenant in tail might have barred them.

(*z*) *Goodall* v. *Skerratt*, 3 Drew, 216—220.

(*a*) *Goodall* v. *Skerratt*, 3 Drew, 216.

3 & 4 Will. 4, c. 27, § 23. Time of limitation twenty years till 1st Jan., 1879.

such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

[1] *Semble* that this section is not retrospective (*b*).

[2] This section is repealed as from the 1st January, 1879, by the Act of 1874; but is re-enacted, with the substitution of "twelve" for "twenty" years, by sect. 6 of the last-mentioned Act.

[3] In the new section the parenthesis, which had previously been partly omitted by a clerical error, is completed.

37 & 38 Vict. c 57, § 6. After that date 12 years.

6. When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail,[4] and any person shall by virtue of such assurance[5] at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid,[6] then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

(*b*) *Penny* v. *Allen*, 7 D. M. G. 426.

[4] Sects. 21 and 22, applied only to estates which a tenant in tail might have barred. The above section applies to remainders which he has been unable to bar, at the time when he has conveyed the property to a purchaser; and provides, in effect, that time shall run in favour of such purchaser from the moment when the power of barring the remainders would have accrued as a present right to the tenant in tail, in case he had made no such conveyance. "The object of the 23rd section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder." *Per* LORD CRANWORTH, C. (*c*)

3 & 4 Will. 4, c. 27, § 23. 37 & 38 Vict. c. 57, § 6.

Effect of these sections.

[5] But if there is any such inherent defect in the assurance under which the purchaser claims, that it could never have barred the remainders—no matter when executed—this section will not apply (*d*).

A conveyance by a tenant in tail, which has not been enrolled, will not bar his issue (*e*).

[6] This section was considered in a recent case before HALL, V.-C., who said it was intended to legislate for the case of possession under a base fee; and he accordingly held that possession under a conveyance which passed successive life estates and also a base fee, was not, during the lives of the tenants for life, "possession" "by virtue of such an assurance" as was contemplated by this section. In other words, time did not run until the determination of the life estates (*f*).

EQUITABLE ESTATES.

24. And be it further enacted,[1] that after the said thirty-first day of December one thousand eight hundred and thirty-three, no person claiming any land or rent in equity[2] shall bring any suit to recover the same but within the period during which, by virtue of the provisions herein-before contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

3 & 4 Will. 4, c. 27, § 24.

Equitable estates to be barred in the same time as legal estates.

(*c*) *Penny* v. *Allen*, 7 D. M. G. 426.

(*d*) *Anderson* v. *Anderson*, 30 B. 209—214; 1 Not. 3830.

(*e*) *Morgan* v. *Morgan*, L. R. 10 Eq. 99—104; 2 Not. 2844.

(*f*) *Mills* v. *Capel*, L. R. 20 Eq. 692—697; 3 Not. 2288.

3 & 4 Will. 4, c. 27, § 24.

[1] Before this enactment courts of Equity, in obedience to the maxim "Equity follows the Law," had exercised their discretion respecting equitable estates, with a due regard to the rules affecting legal estates under the then existing statutes of limitation. But now, according to LORD ABINGER, C.B., "The statute was also intended to put an end altogether to the discretion of courts of Equity in those cases where they had before acted by analogy, to the time limited at law. That was an analogy founded both on law and good sense; but it no longer remains in the discretion of the court, but is incorporated in the statute" (*g*).

Formerly equity followed the law; but is now bound to do so.

[2] "All trusts are now barred by sect. 24, unless saved by sect. 25" (*h*). An equitable estate is only barred by the statute to the same extent that a corresponding legal estate would be barred (*i*).

Equitable doctrines qualify this rule.

But before the Judicature Acts came into operation, the ordinary doctrines of courts of Equity modified the operation of this section in certain cases.

On the one hand, a plaintiff might be barred by *laches*, independently of the statute (*k*); and on the other hand, there were cases in which Equity would grant relief, although the plaintiff's legal title was, strictly speaking, barred. One of such cases was where a plaintiff had been prevented from asserting his legal title by pending proceedings in equity (*l*). The appointment, by the court, of a receiver, did not prevent the operation of the statute against a stranger and in favour of a party (*m*); but it prevented time from running in favour of a stranger to the suit (*n*).

Effect of appointment of a receiver.

Effect of lunacy.

Where the person to be sued is a lunatic, time will not run under the statute as a general rule (*o*).

The carrying over of a fund in lunacy proceedings, to an account showing who are the persons entitled, will suspend the operation of the statute (*p*); but proceedings in lunacy will, in some cases, not be sufficient to prevent time from running (*q*).

Effect of filing a bill.

The commencement of an action at law stops time from running under the statute; and, similarly, it has been held that the filing of

(*g*) *Berrington* v. *Evans*, 1 Y. & C. 439—40; *Commissioners, &c.* v. *Wybrants*, 2 J. & La. T. 195; *Knox* v. *Gye*, L. R. 5 H. L. 656.

(*h*) *Commissioners, &c.* v. *Wybrants*, 2 J. & La. T. 196.

(*i*) *Archbold* v. *Scully*, 9 H. L. C. 360.

(*k*) *Harcourt* v. *White*, 28 B. 303.

(*l*) *Fyson* v. *Pole*, 3 Y. & C. 273; *Grant* v. *Grant*. 3 Rus. 598—607; *Stedman* v. *Hart*, K. 607.

(*m*) *Harrison* v. *Duignan*, 2 Dr. & War. 295; *Groome* v. *Blake*, 8 I. C. L. R. 428; *Re Butler's Estate*, 13 I. Ch. R. 453.

(*n*) *Wrixon* v. *Vize*, 3 Dr. & War. 123; *Chinnery* v. *Evans*, 11 H. L. C. 115; 1 Not. 2848—9.

(*o*) *Stedman* v. *Hart*, K. 607.

(*p*) *Re Walker*, L. R. 7 Ch. 120.

(*q*) *Wilkinson* v. *Wilkinson*, 9 H. 204; *Rock* v. *Cooke*, 1 De G. & S. 675; *Ex parte Hawes* (*Boldero* v. *Halpin*), 19 W. R. 320.

a bill in respect of an equitable right had the same effect, subject to the settled equitable doctrine with regard to *laches*. "What the Judges in England and in this country have said as to the effect of a bill with reference to the statute was that, although it was true that the mere filing of a bill would operate of itself to save the bar of the statute, yet that the court would know how to deal with any improper delay after the filing of the bill; that is, that although the bill might save the bar of the statute, yet that the court might not give the benefit of it to the plaintiff if there was anything in his conduct to disentitle him to its assistance" (*r*). In a recent case a creditor, before his debt was barred, issued a writ in the Common Pleas which would save his right of action for six months. Before the six months expired, he took out an administration summons in the Court of Chancery, and MALINS, V.-C. held that the writ in the Common Pleas only saved the plaintiff's right of action in that court; and that as the full time had run against him during the six months, he could not now commence proceedings in Chancery (*s*). The administration summons was taken out about four months before the Judicature Acts came into operation. 3 & 4 Will. 4, c. 27, § 24.

A judgment creditor, who took no step to enforce his judgment for twenty years, was held to be barred, and was not allowed to prove in a suit instituted within the twenty years by a specialty creditor, the existence of which he subsequently discovered (*t*).

The institution of a suit to administer the trusts of a will does not keep alive the rights of the heir, so far as he claims adversely to the will (*u*).

In a case under the former statute, which has since been much discussed (*x*), it was held that the commencement of an administration suit by a single creditor saved the bar of the statute in favour of all other creditors, so as to enable them to come in under the decree. The Vice-Chancellor, in giving judgment, said: "Every creditor has, to a certain extent, an inchoate interest in a suit instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to the estates of deceased debtors, if the court were to lay down a rule by which every creditor would be bound either to file his bill or bring his action" (*y*). It should, however, be observed, that two grounds upon which the judgment now under discussion was based were, (*a*) that the statute did not bar the debt,

(*r*) *Forster* v. *Thompson*, 4 Dru. & War. 303—318. See also *Pampton* v. *Birchall*, 5 B. 67—74; 11 B. 38.

(*s*) *Manby* v. *Manby*, 3 Ch. D. 101.

(*t*) *Berrington* v. *Evans*, 1 Y. & C. 434. See *Lancaster* v. *Evors*, 10 B. 154: *Tatam* v. *Williams*, 3 Hare 347.

(*u*) *Simmons* v. *Rudall*, 1 Sim. N. S. 115—133-4.

(*x*) *Sterndale* v. *Hankinson*, 1 Sim. 393.

(*y*) *Ibid*, 398.

3 & 4 Will. 4, c. 27, § 24.

but only the remedy; and (β) that the statute did not bar a suit in equity. As regards creditors who have a charge on land (*e.g.* judgment creditors), both these grounds have ceased to exist; for it will be remembered that sect. 24 of the Act 3 & 4 Will. 4 expressly extends its operation to courts of equity; while sect. 34 of the same Act enacts that the statute shall bar the right as well as the remedy.

Accordingly, it is not surprising to find that grave doubts have been expressed whether this decision applies to cases within the present statutes; and while, on the one hand, it has been held that judgment creditors, not already barred, may still come in and have priority over other creditors in a suit by a specialty creditor (*z*); on the other hand, it has been clearly laid down, that an action by another creditor cannot be taken advantage of by a judgment creditor, who was ignorant of its existence till his debt had become barred (*a*); but if the action had been commenced with his concurrence, and he had intended to come in under the decree, *quære* whether he might not do so, although time might have run against him since the commencement of the action (*b*). Questions upon this point have arisen in several cases (*c*), especially in Ireland, and the decisions are not easily reconcileable.

A mortgage (subject to a trust term) was executed in 1807. In 1809 a bill was filed to administer the trust term, but the mortgagees were not made parties till 1841. It was held that they were barred, and that the existence of the suit did not take the case out of the statute (*d*).

Equitable waste.

A claim in respect of equitable waste stands upon the same footing as regards the statute as a claim to the land itself (*e*). The case supporting this *dictum* was, however, commented on by STUART, V.-C. in the following terms: "There can be no doubt that, in that case, the court went to a most extraordinary length—a length unprecedented in any previous case, and which will remain unfollowed in any subsequent case, till a case equally extraordinary shall occur" (*f*).

Legal waste.

Legal waste is within the statutes of limitation; and it has been held that time begins to run against a remainderman in respect of timber wrongfully cut by a tenant for life from the time when the timber is

(*z*) *Berrington* v. *Evans*, 3 Y. & C. 384.

(*a*) *Berrington* v. *Evans*, 1 Y. & C. 434.

(*b*) *Ibid*, p. 440.

(*c*) *O'Kelly* v. *Bodkin*, 2 I. Eq. R. 361—369; 3 I. Eq. R. 390; *Hutchins* v. *O'Sullivan*, 11 I. Eq. R. 443; *Foster* v. *McKenzie*, 17 B. 414; *Watson* v. *Birch*, 15 Sim. 523; *Brown* v. *Lynch*, 4 I. Eq. R. 316; *Carroll* v. *Darcy*, 10 I. Eq. R. 321; *Bennett* v. *Barnard*, 12 I. Eq. R. 229; *Bermingham* v. *Burke*, 2 Jo. & La. T. 699—714.

(*d*) *Humble* v. *Humble*, 24 B. 535—540.

(*e*) *Duke of Leeds* v. *Earl of Amherst*, 2 Phil. 117—125.

(*f*) *Morris* v. *Morris*, 6 W. R. 427—9.

cut, and not from the death of the tenant for life, because such cutting is a tortious act (*g*); and the remainderman is barred in six years, as if his claim were a simple demand (*h*).

3 & 4 Will. 4, c. 27, § 24.

Where a remainderman, who knew that a tenant for life had wrongfully cut timber, did not file a bill till nearly twenty years after the death of the tenant for life, it was held that he was barred by delay, independently of the statute (*i*).

Laches bars independently of the statute.

It was held by SHADWELL, V.-C., that a foreclosure suit was a proceeding for the recovery of money, within sect. 40 (*k*); but his decision was over-ruled by LORD ST. LEONARDS, when Lord Chancellor of Ireland, who said: "It appears to me, therefore, that the right to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within the 24th section of the statute 3 & 4 Will. 4, and the 1 Vict. c. 28; and that the time is governed by the legal right of the party to bring an action; or if he may not have the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one. If the twenty-fourth section does not extend to a legal mortgage, then it is a *casus omissus* out of the Act; and as the general right of a mortgagee to file a bill of foreclosure is not taken away, equity would once more adopt the legal rule by analogy" (*l*).

Foreclosure suits or actions are within sect. 24.

EXPRESS TRUSTS.

3 & 4 Will. 4, c. 27, § 25.

25.[1] Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust[2] the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.[3]

In cases of express trust time only runs in favour of a purchaser for valuable consideration, and only from the time of his conveyance.

(*g*) *Seagrave* v. *Knight*, L. R. 3 Eq. 398; L. R. 2 Ch. 628—632; *Higginbotham* v. *Hawkins*, L. R. 7 Ch. 676.

(*h*) *Birch-Wolfe* v. *Birch*, L. R. 9 Eq. 683—692.

(*i*) *Harcourt* v. *White*, 28 B. 303.

(*k*) *Dearman* v. *Wyche*, 9 Sim. 570.

(*l*) *Wrixon* v. *Vize*, 3 Dr. & War. 104—118.

3 & 4 Will. 4, c. 27, § 25.

By sect. 25, sub-sect. 2, of the Judicature Act, 1873, (*m*) it is enacted that

36 & 37 Vict. c. 66, § 25 (2).

> No claim of a cestui-que-trust against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by any Statute of Limitations.

Express trusts under the Judicature Acts.

Sect. 24 of the last-mentioned Act provides, in effect, that equitable rights shall be recognised in every branch of the High Court, and also by the Court of Appeal.

[1] The following remarks as to the effect of sect. 25 of 3 & 4 Wm. 4, c. 27, were made by Lord St. Leonards, when Lord Chancellor of Ireland:—"The 25th section of the late Statute of Limitation, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui-que-trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place, when the trustee sells to a third party for valuable consideration the property so held by him in trust" (*n*).

Time runs in favour of a purchaser for value from a trustee.

Sect. 25 applies only to express trusts.

Semble that this section applies only to cases where express trusts are declared by some written instrument, and not to circumstances which a Court of Equity would hold to constitute a person a constructive trustee (*o*).

Constructive trusts not within sect. 25.

Accordingly, it has been held that a mere covenant to settle a sum of money does not constitute the covenant or a trustee (*p*). But when a settlement recited the payment of 1000*l.* by A. to B., and contained a covenant by B. to invest it in the joint names of A. and B. upon certain trusts, when the money had in fact never been paid to B., it was held that a trust within this section was created (*q*).

Acting as trustee brings a person within sect. 25.

And where a trust is in existence, a person who is not legally a trustee may constitute himself an express trustee within this section by dealing with the trust property, and assuming to act as trustee (*r*). But the case is different where a *cestui-que-trust* who has only a limited interest, wrongfully does, for his own benefit, an act which ought to have been done by the trustees for the benefit of

(*m*) 36 & 37 Vict. c. 66.

(*n*) *Law* v. *Bagwell*, 4 Dr. & War. 398.

(*o*) *Petre* v. *Petre*, 1 Drew. 371—393; *Dickinson* v. *Teasdale*, 1 De. G. J. & S. 52—59.

(*p*) *Spickernell* v. *Hotham*, K. 669; *Stone* v. *Stone*, L. R. 5. Ch. 74.

(*q*) *Stone* v. *Stone*, L. R. 5 Ch. 74.

(*r*) *Life Association of Scotland* v. *Siddal*, 3 De. G. F. & J. 58—72; *Sturgis* v. *Morse*, 3 De. G. & J. 1.

all the *cestuis-que-trustent* (*s*). Charitable trusts are within this section, and also within sect. 24 (*t*).

3 & 4 Will. 4, c. 27, § 25.

The question what amounts to an express trust within the meaning of this section has formed the subject of many decisions; and these have not always been consistent, especially with regard to cases that would fall within sect. 40 or sect. 42, unless saved by this section.

Charities are within sect. 25.

What is an express trust within sect. 25.

In an Irish case, it has been held that even an express trust for payment of debts was not within sect. 25 (*u*), but this decision must now be considered as overruled; and it may be laid down, as a general rule, that although a *mere charge* by will of real estate with payment of debts (if the personal estate should prove insufficient) (*x*) or legacies (*y*) is not within this section, a devise *upon trust* to pay debts (*z*) or legacies (*a*) or annuities (*b*) is saved by sect. 25 from the bar of sects. 40 and 42. So also is a trust term to secure the payment of annuities (*c*), or to raise legacies or portions (*d*), although the trust may be to raise "any sum not exceeding" a specified amount (*e*)

After Lord Plunkett had expressed a doubt whether a trust for payment of debts amounted to an express trust (*f*), it was decided that a devise to trustees coupled with a mere charge of debts brought the case within sect. 25 (*g*). Similarly, a devise to trustees upon trust to convey to A., subject to and charged with annuities in favour of charities was held to constitute A. a trustee within sect. 25 (*h*). But a legal devise of an estate charged with the payment of debts (*i*) or annuities (*k*), without the intervention of trustees, was held not to make the devisee a trustee within sect. 25.

(*s*) *Dane's Estate*, I. R. 5 Eq. 498.

(*t*) *St. Mary Magdalen* v. *Atty.-Genl.*, 6 H. L. C. 189—215; *Atty.-Genl.* v. *Flint*, 4 H. 147; *Commissioners of Donations* v. *Wybrants* 2 Jo. & La. T. 182.

(*u*) *Young* v. *Wilton*, 10 I. Eq. R. 10—19.

(*x*) *Dickinson* v. *Teasdale*, 1 D. J. & S. 52; *Jacquet* v. *Jacquet*, 27 B. 332.

(*y*) *Knox* v. *Kelly*, 6 I. Eq. R. 279; *Proud* v. *Proud*, 32 B. 234.

(*z*) *Jacquet* v. *Jacquet*, 27 B. 332.

(*a*) *Watson* v. *Saul*, 1 Giff. 188.

(*b*) *Knight* v. *Bowyer*, 2 De. G. & J. 421.

(*c*) *Salter* v. *Cavanagh*, 2 D. & Wal. 668; *Lewis* v. *Duncombe*, 29 B. 175; *Cox* v. *Dolman*, 2 D. M. G. 592; *Snow* v. *Booth*, 2 K. & J. 132 (in which *Hunter* v. *Nockolds*, 1 M. & G. 640 was questioned).

(*d*) *Blair* v. *Nugent*, 3 Jo. & La. T. 658—668 *Lawton* v. *Ford*, L. R. 2 Eq. 97; *Young* v. *Lord Waterpark*, 13 Sim. 204.

(*e*) *Gough* v. *Bult*, 16 Sim. 45—323.

(*f*) *Dillon* v. *Cruise*, 3 I. Eq. R. 70, 81, 82.

(*g*) *Hunt* v. *Bateman*, 10 I. Eq. R. 360.

(*h*) *Commissioners of Donations* v. *Wybrants*, 2 Jo. La. T. 182.

(*i*) *Dundas* v. *Blake*, 11 I. Eq. R. 138.

(*k*) *Francis* v. *Grover*, 5 H. 39, 50, 51.

3 & 4 Will. 4, c. 27, **§ 25.**

A devise of land upon trust to sell and pay annuities out of the interest of the proceeds, and until sale out of the rents, is of course an express trust (*l*). So a devise of land upon trust for sale creates an express trust within this section, and will be enforced although the trustees may have been in possession of portions of the land for fifty years (*m*), unless the persons interested in the proceeds of sale have elected to take the property as real estate (*n*).

Trust for sale is express trust, and sect. 25 extends to the proceeds of sale.

KNIGHT BRUCE, V.-C. in 1851, doubted whether or not the proceeds of real estate directed to be sold fell within this sect. 25 or sect. 40 (*o*); but it has since been decided that such proceeds, when there is an express trust, are within sect. 25 (*p*).

New enactment as to express trusts within §§ 40 & 42.

The conflicting decisions as to what constitutes an express trust sufficient to take cases that would otherwise fall within sects. 40 and 42 out of the operation of the statute, have, however, been brought under the notice of the Legislature, and the following enactment (which forms sect. 10 of the Act of 1874) is the result:—

37 & 38 Vict. c 57, **§ 10.**

10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.

Express trust not to take money or legacies charged on land out of §§ 40 & 42.

It will therefore be unimportant, after 1st January, 1879, as regards cases provided for by sect. 40 or sect. 42, whether there is an express trust or not. Such a trust will no longer save the claim of the cestui-que-trust, *as against the land*, from being barred; but on the other hand he will, by sect. 25, sub-sect. 2, of the Judicature Act, 1873 (*q*), have a right of action *against the trustee personally*, which no lapse of time will bar. The same right will exist in respect of legacies secured by an express trust, but not charged on land. The wording of sect. 10

(*l*) *Ward* v. *Arch*, 12 Sim. 472.
(*m*) *Mutlow* v. *Bigg*, L. R. 18 Eq 246; 3 Not. 1649.
(*n*) *Mutlow* v. *Bigg*, 1 Ch. D. 385.
(*o*) *Pawsey* v. *Barnes*, 20 L. J. Ch. 393.
(*p*) *Mutlow* v. *Bigg*, L. R. 18 Eq. 246; *Gough* v. *Bult*, 16 Sim. 323; *Burrowes* v. *Gore*, 6 H. L. C. 907.
(*q*) 36 & 37 Vict. c. 66, *ante*, p. 56.

of the Act of 1874 should be carefully compared with that of sect. 40 of 3 & 4 Will. 4. c. 27 (*r*).

3 & 4 Will. 4, c. 27, § 25. 37 & 38 Vict. c. 57, § 10.

[1] An agent holding a power of attorney is an express trustee for his principal (*s*).

Power of attorney.

A vendor's lien for unpaid purchase-money is not an express trust within this section, but is within sect. 40 (*t*).

Vendor's lien.

A mortgage by way of trust for sale is not a trust within this section (*u*). It falls within sect. 28, and the fact that there is an express trust of the sale moneys is immaterial (*x*). But the rule does not apply to a case where a person to whom land is conveyed upon trust to sell and pay off a mortgage to X. and retain a debt due to himself, takes a transfer of the mortgage and remains in possession for more than the statutory period. In such a case time will not run (*y*).

Mortgage by way of trust.

In a recent case HALL, V.-C. held that a mortgagee of a life estate, who had entered into possession under an order of the court, was in a fiduciary position with regard to the remaindermen; but this decision was reversed on appeal, and the case held to be within sect. 42 (*z*).

Mortgagee in possession under order of court.

It was laid down recently (*a*), in the House of Lords, by LORD WESTBURY (LORD HATHERLEY, C. *dissentiente*), that no fiduciary relation exists between a partner and the executors of his deceased partner.

Partners are not trustees *inter se*.

Upon the dissolution of a friendly society, a resolution in effect declaring that its property should be held in trust for creditors, was held to create an express trust (*b*).

Trustees of a fund established by Civil servants of the East India Company for granting pensions and annuities to members and their widows and children, were held to be trustees, not merely for the association generally, but for the members individually, so as to prevent the claim of a member from being barred by the statute (*c*).

Trustees of benefit society are trustees for members.

The possession of a *cestui-que-trust* under his trustee is not adverse to the trustee within sect. 3, nor is he a tenant at will to the trustee within sect. 7 (*d*). His possession is equivalent to that of the trustee (*e*).

Possession of *cestui-que-trust* is possession of trustee.

(*r*) *Infra*, p. 83.
(*s*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233.
(*t*) *Toft* v. *Stephenson*, 7 H. 1.
(*u*) *Yardley* v. *Holland*, L. R. 20. Eq. 428; *Law* v. *Bagwell*, 4 Dr. & War. 98.
(*x*) *Locking* v. *Parker*, L. R. 8 Ch. 30.
(*y*) *Latter* v. *Dashwood*, 6 Sim. 462.
(*z*) *Hickman* v. *Upsall*, 2 Ch. D. 617; 4 Ch. D. 144.
(*a*) *Knox* v. *Gye*, L. R. 5 H. L. 656.
(*b*) *Pare* v. *Clegg*, 29 B. 589.
(*c*) *Edwards* v. *Warden*, 1 App. Ca. 281, reversing L. R. 9 Eq. 495.
(*d*) *Garrard* v. *Tuck*, 8 C. B. 232.
(*e*) *Drummond* v. *Sant*, L. R. 6 Q. B. 763; *Lister* v. *Pickford*, 13 W. R. 827.

3 & 4 Will. 4, c. 27, § 25. 37 & 38 Vict. c. 57, § 10.

Land was reclaimed from the river Thames under the authority of a private Act of Parliament by persons in possession of the adjoining land, under an agreement for a lease for ninety-nine years expiring in 1867. No lease was ever executed. Held that the statute was no bar to the lessors, as the lessees, though legally tenants at will, were in effect *cestuis-que-trustent* (*f*).

Mistake of trustees.

Where trustees by mistake let the wrong persons into possession as *cestuis-que-trustent*, it was held that time did not run against the real *cestuis-que-trustent* (*g*).

A purchaser from a *cestui-que-trust*, who has only a limited interest, can set up the statute against a remainderman. He is not an express trustee within this section (*h*). And the same rule applies to a stranger wrongfully let into possession by such a *cestui-que-trust* (*i*).

Where trustees do not act, this section does not apply to persons wrongfully obtaining possession (*k*).

It has been stated before that after a sale by an ordinary trustee to a *bonâ fide* purchaser for value, sect. 25 ceases to apply as between the *cestui-que-trust* and the purchaser.

Purchasers and lessees of charity lands.

And it was held by LORD CRANWORTH and LORD WENSLEYDALE (reversing the decision of LORD ROMILLY) (*l*), that this section does not apply to the case of a sale of charity lands by trustees to a purchaser for value so as to make him a trustee for the charity, even though he had notice of the trust (*m*). And another decision of LORD ROMILLY, setting aside a lease of charity land for 500 years after the lessee had been in possession 128 years, was reversed on appeal, on the ground that the lessors were barred by the statute (*n*).

This decision was probably based on the fact that such a lease was void under 13 Eliz., c. 10, sect. 3, and the lessee had acquired title by adverse possession. Accordingly LORD ROMILLY decided, in 1859 that in the case of an improvident lease by a charity, time began to run in favour of the lessee from the grant of the lease, and that sect. 25 did not apply (*o*). But in 1870, the Vice-Chancellor of Ireland held a purchaser for value, from a trustee of charity property, with notice of the trusts, to be an express trustee for the charity within sect. 25 (*p*). And in a still more recent case, JESSEL, M. R., held (following

(*f*) *Drummond* v. *Sant*, L. R. 6 Q. B. 763; 2 Not. 4169.
(*g*) *Lister* v. *Pickford*, 13 W. R. 827; 1 Not. 4138.
(*h*) *Petre* v. *Petre*, 1 Drew. 371.
(*i*) *Melling* v. *Leak*, 16 C. B. 652—658.
(*k*) *Burroughs* v. *M'Creight*, 1 Jo. & La. T. 290—304.
(*l*) B. 223.
(*m*) *Magdalen College* v. *A.-G.*, 6 H. L. C. 189.
(*n*) *A. G.* v. *Davey*, 19 B. 251; 4 De G. & J. 136.
(*o*) *Att.-Genl.* v. *Payne*, 27 B. 168—174.
(*p*) *Att.-Genl.* v. *Davis*, 18 W. R. 1132.

Pennington v. *Cardale* (*q*) that a lease granted in 1783, for value, at a peppercorn rent for ninety-nine years, by the governors of a charity was not void, but voidable. Consequently it might at any time be avoided by the governors, and time did not begin to run against them under the statute until they determined to avoid it and brought an action to set it aside (*r*). 3 & 4 Will. 4, c. 27, § 25.

[3] Time is no bar in the case of a breach of trust (*s*). And this rule applies as between a *cestui-que-trust* and the executor of a trustee who has committed a breach of trust (*t*), and also extends to assets of a trustee who has committed a breach of trust in the hands of the administrator of his executor (*u*). But an assignee for value with notice of a breach of trust is not an express trustee (*x*). Time no bar in cases of breach of trust, except in favour of an assignee for value.

Minor questions upon this section have been raised in several other cases (*y*) which may be referred to incidentally.

CONCEALED FRAUD.

26. And be it further enacted, that in every case of a concealed fraud[1] the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence[2] might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bonâ fide* purchaser[3] for valuable consideration who has not assisted in the com- 3 & 4 Will. 4, c. 27, § 26. Concealed fraud—time only runs from discovery by reasonable diligence, except in favour of a *bonâ fide* purchaser.

(*q*) 3 H. & N. 656—666.
(*r*) *Magdalen College* v. *Knotts*, 5 Ch. D. 175—180.
(*s*) *Life Association of Scotland* v. *Siddall*, 3 De G. F. & J. 58—72.
(*t*) *Brittlebank* v. *Goodwin*, L. R. 5 Eq. 545.
(*u*) *Woodhouse* v. *Woodhouse*, L. R. 5 Ch. 514.
(*x*) *Pyrah* v. *Woodcock*, 24 L. T. N. S. 407.
(*y*) *Watson* v. *Woodman*, L. R. 20 Eq. 721; *Sleeman* v. *Wilson*, L. R. 13 Eq. 36; *Cadbury* v. *Smith*, L. R. 9 Eq. 37; *Butler* v. *Carter*, L. R. 5 Eq. 276; *Prowse* v. *Spurgin*, L. R. 5 Eq. 99; *Binns* v. *Nichols*, L. R. 2 Eq. 256; *Shaw* v. *Johnson*, 1 Dr. & S. 412; *Round* v. *Bell*, 30 B. 121; *Lord Clanricarde* v. *Heming*, 30 B. 175; *Henderson* v. *Atkins*, 7 W. R. 387; *Thompson* v. *Simpson*, 1 Dr. & War. 459—489; *Chalmer* v. *Bradley*, 1 Jac. & W. 51.

3 & 4 Will. 4, c. 27, § 26.

mission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe [4] that any such fraud had been committed.[5]

Meaning of "concealed fraud."

[1] "What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment, enables himself to enter and hold." *Per* KINDERSLY, V.-C. (*z*).

What amounts to concealed fraud.

The omission by an insolvent from his schedule of reversionary interests in freehold and copyhold property to the equity of redemption of which he was entitled, was held to be a "concealed fraud" within this section (*a*).

Concealment of the illegitimacy of an eldest son by such son and his parents, from the next (and eldest legitimate) son, is a "concealed fraud" (*b*).

Principal and agent.

Concealment by an agent, who purchases from his principal at an undervalue, amounts to fraud; and such a transaction has been opened upon bill filed, although all matters in dispute between the parties had been previously referred to an arbitrator, and mutual releases had been executed pursuant to his award (*c*).

Conveyance from lunatic.

The mere fact of obtaining a conveyance from a lunatic who is represented by an independent solicitor is not a fraud, in the absence of *mala fides* or knowledge of the lunacy on the part of the purchaser (*d*). "But a case of direct and positive fraud, of which the lunacy forms one fact or circumstance, is clearly a subject for equitable interference." *Per* LORD TRURO (*e*). And *semble* that knowledge on the part of the grantee, of the state of mind of the lunatic, would be sufficient to bring the case within sect. 26 (*f*). But if the alleged fraud is open and palpable, the fact of the person affected thereby being of very dull intellect, though not lunatic, will not induce the court to hold it to be "concealed fraud," especially where such person acted under the advice of his solicitor (*g*).

Dulness of intellect does not render an open fraud "concealed."

The working by a surface owner, of mines under his land which

(*z*) *Petre* v. *Petre*, 1 Drew. 397. Compare *Vane* v. *Vane*, L. R. 8 Ch. 383.

(*a*) *Sturgis* v. *Morse*, 24 B. 541.

(*b* *Vane* v. *Vane*, 21 W. R. 66; L. R. 8 Ch. 383.

(*c*) *Trevelyan* v. *Charter*, 11 Cl. & Fin. 714.

(*d*) *Price* v. *Berrington*, 3 M. & G. 486; compare *Molton* v. *Camroux*, 4 Ex. 17.

(*e*) 3 M. & G. 498.

(*f*) *Lewis* v. *Thomas*, 3 H. 26.

(*g*) *Manby* v. *Bewicke*, 3 K. & J. 343.

3 & 4 Will. 4, c. 27, § 26.

are reserved to the lord of the manor, without the lord's knowledge, is a concealed fraud within this section (*h*). Underground working of an adjoining owner's mine is a concealed trespass; but LORD ROMILLY, M. R. thought it did not amount to a concealed fraud, in the absence of proof of direct fraud (*i*). But this opinion has been questioned by MALINS, V.-C. who said: "For the purposes of the statute the breaking of bounds into your neighbour's colliery must be considered a fraudulent act" (*k*). And the same view has been taken by HALL, V.-C (*l*) and FRY, J. (*m*) in very recent cases.

Underground trespass.

The interest of a fund in court had been paid to the heir-at-law of a former owner of the property which it represented, for fifty years under an order of court. Upon petition for payment out to his representatives, the respondents (the devisees of such former owner) were not allowed to set up a case of fraud in obtaining the order for payment of interest; but leave was given them to file a bill within ten days (*n*).

Case of concealed fraud cannot be raised on petition.

In cases of fraud, distinct proof will be required against persons liable to be made answerable for the consequences of it (*o*).

Where it was doubtful whether renewable leaseholds passed by an instrument under which the defendant claimed, but his predecessors in title had entered and obtained renewals for their own benefit, under circumstances which the plaintiff alleged to be fraudulent sixty-two years before bill filed, the plaintiff was held to be barred, and the case not to come within this section. All the persons who could have explained the circumstances were dead (*p*).

Laches disentitles to relief.

A plaintiff, in 1868, set up a title which depended upon a marriage in 1724, and alleged that certain registers were fraudulently mutilated and an index of names gummed up, so that he was unable to ascertain the names of persons married during that year. It was held that the marriage might have been proved with reasonable diligence before 1868, and a demurrer was allowed (*q*).

What amounts to "reasonable diligence."

Disputed boundaries between two adjoining collieries were settled by mutual agreement in 1862, and releases in respect of prior wrongful workings given in 1864. Notwithstanding this, the defendants continued to get coal by underground workings from the plaintiffs' mines

(*h*) *Earl of Dartmouth* v. *Spittle*, 19 W. R. 444.

(*i*) *Dean* v. *Thwaite*, 21 B. 621.

(*k*) *Ecclesiastical Commissioners* v. *N. E. Ry. Co.* 4 Ch. D. 845—860; 4 Not. 1262.

(*l*) *Ashton* v. *Stock*, 25 W. R. 862; 4 Not. 1261.

(*m*) *Williams* v. *Raggett*, 46 L. J. Ch. 849; 4 Not. 1263.

(*n*) *Ex parte Breach*, 12 W. R. 769.

(*o*) *Dean* v. *Thwaite*, 21 B. 621—623.

(*p*) *Petre* v. *Petre*, 1 Drew. 371.

(*q*) *Chetham* v. *Hoare*, L. R. 9 Eq. 571. See also *Sturgis v. Morse*, 21, B. 541—546.

3 & 4 Will. 4, c. 27, § 26.

during 1863 and 1864; and upon discovering such workings in 1870, the plaintiffs filed a bill for an account. MALINS, V.-C. held that though they had made no inquiry, they had used reasonable diligence. He said: "Are you bound to make inquiry of your neighbour whether he has robbed you or not? If you have a neighbour, and treat him as a respectable person who would not do so improper an act, I cannot conceive that there can be any necessity on the part of the plaintiffs to make the inquiry, *Have you violated these boundaries which we settled in* 1862? *Did you, in* 1863, *in defiance of all that, break the bounds, and carry away one hundred thousand tons of coal, and break our boundary so as to expose us to inundations from your colliery?* I cannot conceive that reasonable diligence required it" (*r*).

In the same case, the Vice-Chancellor disapproved of the rule laid down by LORD ROMILLY, M.R., that in the absence of proof to the contrary the Court would assume the whole of the working to have taken place within six years (and so to fall within sect. 42), but that the defendant might escape liability by proving that the whole of the coal had, in fact, been got more than six years before bill filed (*s*). MALINS, V.-C., remarked, "This is too broad in my opinion. If it was taken away more than six years ago and the plaintiff knew that, or had the means of knowing it, then it is very reasonable that the statute should be applied; but, according to this, although in the case I have suggested, a man may have an estate which he believes to be untouched, his neighbour may have robbed him more than six years ago, but he does not find him out, according to this decision he may rob him successfully, because the *Statute of Limitations* does not apply. That, in my opinion, lays down the rule far too broadly. If Lord Romilly meant to say, *Let him prove that it was done more than six years (ago?) and the plaintiff knew it*, then it is in accordance with all the other decisions, and with my view of the case" (*t*).

And when a bill filed to established the plaintiff's title as *heir at law* to certain estates of which his elder brother B. and B.'s heir had been in possession for forty years, alleged that the fact of B.'s illegitimacy had been concealed from the plaintiff by their parents, and B., a demurer, was overruled on the ground that the plaintiff had used reasonable diligence (*u*).

(*r*) *Ecclesiastical Commissioners* v. *N. E. Ry. Co.* 4 Ch. D. 845—861-2; 4 Not. 1262. See also *Ashton* v. *Stock*, 25 W. R. 862; 4 Not. 1261, and *Williams* v. *Raggett*, 46 L. J. Ch. 849; 4 Not. 1263.

(*s*) *Dean* v. *Thwaite*, 21 B. 621.

(*t*) 4 Ch. D. 864. 4 Not. 1262. Compare *Ashton* v. *Stock*, 25 W. R. 862; 4 Not. 1261; *Williams* v. *Raggett*, 46 L. J. Ch. 849; 4 Not. 1263.

(*u*) *Vane* v. *Vane*, L. R. 8 Ch. 383.

[3] In the same case it was doubted whether the defence of being a *bonâ fide* purchaser for value could be raised by demurrer (*x*); and the meaning of the words from "*bonâ fide* purchaser" to the end of the section was fully discussed by JAMES, L. J., who came to the conclusion "that it was meant that the purchaser should be really a purchaser, and not merely a donee taking a gift under the form of a purchase." 3 & 4 Will. 4, c. 27, § 26. Meaning of "*bonâ fide* purchaser."

[4] The Court was also of opinion that the concluding words of the section were not intended to make actual personal fraud necessary to deprive a purchaser of the benefit of the exception; but that the section ought to be read as if it had concluded thus:—"who did not know, and had no reason to believe, either by himself or by some agent whose knowledge or reason to believe is, by settled law taken to be his, that any such fraud had been committed" (*y*). Fraud of agent imputed to principal.

[5] In cases of mistake time runs from the discovery of the mistake (*z*).

In cases of underground trespass into an adjoining owner's coal mine, the measure of damages is the actual value at the pit's mouth of the coal wrongfully abstracted (*a*). And the trespasser has been made to pay damages in respect of coal which his wrongful acts have made unworkable (*b*). Underground trespass—measure of damages.

ACQUIESCENCE.

27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence [1] or otherwise to any person [2] whose right to bring a suit may not be barred by virtue of this Act. 3 & 4 Will. 4, c. 27, § 27. Statute not to affect equitable rules as to acquiescence.

[1] "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain." *Per* LORD COTTENHAM, C. (*c*). Acquiescence Effect of this section.

(*x*) L. R. 8 Ch. 388.
(*y*) *Ibid.* 400.
(*z*) *Brooksbank* v. *Smith*, 2 Y. & C. 58.
(*a*) *Ecclesiastical Commissioners* v. *N. E. R. Co.*, 4 Ch. D. 845; 4 Not. 1262; *Ashton* v. *Stock*, 25 W. R. 862; 4 Not. 1261.
(*b*) *Williams* v. *Raggett*, 46 L J. Ch. 849; 4 Not. 1263.
(*c*) *Duke of Leeds* v *Earl of Amherst*, 2 Phil. 123.

3 & 4 Will. 4, c. 27, § 27.

Acquiescence of infants.

cannot be imputed to a minor (*d*) unless he is one of several plaintiffs; and then *semble* he may be bound by the acquiescence of a co-plaintiff who is *sui juris*. *Per* TURNER, V.-C. (*e*); who also said, in the same case, "Parties cannot, I think, be said to acquiesce in the claims of others, unless they are fully cognizant of their rights to dispute them" (*f*).

Acquiescence and *laches* distinguished.

The distinction between acquiescence and *laches* was thus laid down by LORD CRANWORTH C.:—"So far as *laches* is a defence, I take it that where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than *laches*. . . . . But the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be an equitable bar (*g*).

Acquiescence imports full knowledge.

"Acquiescence, as I conceive, imparts knowledge . . . and in cases of this sort I think that acquiescence imparts full knowledge, for I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights, and of all the material facts and circumstances of the case." *Per* TURNER, L. J. (*h*). As to whether an equitable remainderman is bound by acquiescence and the onus of proof when acquiescence is set up by a trustee against his *cestui que trust*, see *Ibid.* pp. 73 and 77. A bill, in 1846, to set aside a sale of a reversionary interest at an alleged undervalue in 1822 was dismissed with costs on the ground of delay; the tenant for life having been dead sixteen years and the purchaser more than twenty years (*i*).

Where a widow, who was entitled to a legacy and annuity, lived twenty-eight years and might have enforced payment of them, a bill by her executrix to enforce such payment was dismissed with costs, no evidence of any payment or explanation of non-payment being given (*k*).

A residuary legatee who knew of his testator's will was held to be barred by twenty-three years' acquiescence (*l*).

Beneficiaries under a will, who had acquiesced for twelve years

(*d*) *Duke of Leeds* v. *Earl of Amherst*, 2 Phil. 123.

(*e*) *Marker* v. *Marker*, 9 H. 11—15. But compare *March* v. *Russell*, 3 M. & C. 31.

(*f*) *Ibid.*, p. 16.

(*g*) *Archbold* v. *Scully*, 9 H. L. C. 360—383. Compare *Petre* v. *Petre*, cited under sect. 26, *ante*, pp. 62, 63.

(*h*) *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 58—74.

(*i*) *Sibbering* v. *Earl of Balcarras*, 3 De G. & S. 737. Compare *Spackman* v. *Evans*, L. R. 3 H. L. 171—221; *Petre* v. *Petre*, *ante*, p. 63.

(*k*) *Pattison* v. *Hawkesworth*, 10 B. 375.

(*l*) *Portlock* v. *Gardner*, 11 L. J. N. S. (Ch.) 313.

in an investment which they alleged to be a breach of trust, were held disentitled to relief. Their testator had been dead nearly fifty-three years (*m*).

3 & 4 Will. 4, c. 27, § 27.

Acquiescence applies even between trustee and *cestui que trust*.

Although time does not run as between trustee and *cestui que trust*, the general rule of equity that encouragement should not be given to stale demands is equally applicable (*n*).

Where annuities were charged upon an estate which became unprofitable, and yielded no income for nearly thirty years, it was held that the annuitants were entitled to arrears of their annuities out of the first funds received, when the estate again became profitable; and that they were not guilty of *laches* in not taking proceedings during the time in which no payments could have been made to them (*o*).

It has not been thought necessary to state the effect of numerous old cases upon the question of acquiescence, which may, however, be referred to (*p*).

MORTGAGEES IN POSSESSION.

3 & 4 Will. 4, c. 27, § 28.

Time runs in favour of a mortgagee in possession from the time he takes possession, or from any acknowledgment he may make of the mortgagor's title.

28.[1] And be it further enacted,[8] that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage,[5] the mortgagor or any person claiming through him,[4] shall not bring a suit to redeem the mortgage but within twenty[2] years[6] next after the time at which the mortgagee[8] obtained such possession or receipt,[7] unless in the meantime an acknowledgment[9] of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent[10] of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty[2] years next after the time at which such

(*m*) *Browne* v. *Cross*, 14 B. 105.

(*n*) *M'Donnell* v. *White*, 11 H. L. C. 570—579; *Thompson* v. *Eastwood*, 2 Ap. Ca. 215. Compare *Green's case*, L. R 18 Eq. 428—432. And see now 36 & 37 Vict. c. 66, sect. 25 (2).

(*o*) *Pitt* v. *Lord Dacre*, 3 Ch. D. 295—299.

(*p*) *Swanton* v. *Raven*, 3 Atk. 104; *Newton* v. *Ayscough*, 19 Ves. 534; *Selsey* v. *Rhodes*, 1 Bli. N. R. 1; *Hicks* v. *Cooke*, 4 Dow. 17; *Tucker* v. *Tucker*, 13 Price 119; *Gray* v. *Chaplin*, 2 Russ. 126.

3 & 4 Will. 4, c. 27, § 28.

acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money,[11] the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment with interest of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.[11]

Proviso for case of acknowledgment by one of several mortgagees in possession.

[1] This section is repealed from the 1st of January, 1879, by the Real Property Limitation Act, 1874, sect. 7 of which is as follows:—

37 & 38 Vict. c. 57, § 7.

7. [3] When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of

any rent comprised in his mortgage,[4] the mortgagor, or any person claiming through him,[5] shall not bring any action or suit to redeem the mortgage but within twelve[2] years[6] next after the time at which the mortgagee[8] obtained such possession or receipt,[7] unless in the meantime an acknowledgment[9] in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent[10] of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve[2] years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the

3 & 4 Will. 4, c. 27, § 28. 37 & 38 Vict. c. 57, § 7.

Time of limitation reduced from twenty to twelve years.

3 & 4 Will. 4, c. 27, § 28. 37 & 38 Vict. c. 57, § 7.

mortgage money,[11] the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.[12]

Effect of new enactment.

[2] Sect. 7 of the Act of 1874 merely substitutes "twelve years" for "twenty years," and corrects one or two verbal inaccuracies in the older enactment; so the cases decided upon the construction of 3 & 4 Will. 4, c. 27, sect. 28, will still be useful.

Retrospective.

[3] This section is retrospective. When a mortgagee had been in possession seventeen years before the passing of the Act, it was held that the mortgagor had only three years afterwards within which to take proceedings (*q*).

[4] But where a mortgagee, who had received no interest or acknowledgment since 1812, and did not even know of his rights, was brought before the Court in 1837 as a defendant to a bill filed in 1833 by a subsequent incumbrancer, it was held that he was not barred by the statute (*r*).

[5] A mortgage by way of trust for sale is within this section, and not sect. 25 (*s*).

Quære, whether a sale, with a conditional right of re-purchase at the same price, is a mortgage within this section (*t*).

Express agreement may exclude this section.

[6] "I am disposed to think that the statute cannot apply, so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, *where the original contract is* in terms *that the mortgagor may redeem* at any time *during a period extending beyond the twenty years;* but that does not dispose of the question whether the statute would not bar any such right as is claimed here to redeem on terms different from those expressed in the deed." *Per* LORD CRANWORTH, C. (*u*).

When time begins to run.

[7] In the absence of any such special agreement, however, time runs against a mortgagor from the moment a mortgagee takes possession *quâ* mortgagee; and he will be barred in twenty [or twelve] years,

(*q*) *Batchelor* v. *Middleton*, 6 H. 75.

(*r*) *Murphy* v. *Stone*, 1 Dr. & Wal. 236.

(*s*) *Law* v. *Bagwell*, 4 Dr. & War. 98; *Locking* v. *Parker*, L. R. 8 Ch. 30; 3 Not. 297; *Yardley* v. *Holland*, L. R. 20 Eq. 428; 3 Not. 2150.

(*t*) *Alderson* v. *White*, 2 De G. & J. 97.

(*u*) *Alderson* v. *White*, 2 De G. & J. 97—109.

without any saving for disabilities, unless some admission of his title is made by the mortgagee (*x*). 3 & 4 Will. 4, c. 27, § 28.

[8] But if he enters in some other character than that of mortgagee (*e.g.*, as purchaser of the equity of redemption) the rule does not apply, but he holds under the title of his vendor (*y*). And if a mortgagee in possession purchases the interest of the tenant for life in the equity of redemption, time will not run against the remaindermen (*z*). And the same rule applies where a mortgagee becomes tenant for life or tenant in common of the equity of redemption otherwise than by purchase (*a*). 37 & 38 Vict. c. 57, § 7.

Where a person entered into possession under an agreement to purchase a mortgaged estate, and actually paid off the mortgages, the mortgagor on filing a bill for redemption nearly fifty years afterwards was held to be barred (*b*). Where a bill for redemption, filed twenty-five years after the date of the mortgage, stated that the mortgagee entered into possession "*shortly after*" the date of the mortgage, the Court would not presume, upon demurrer, that he had been in possession twenty years (*c*).

Waste by mortgagee's permission.

The statute was held to be no bar to a mortgagor's right to recover damages for coal which the mortgagee had allowed trespassers to abstract from under the mortgaged property (*d*).

What amounts to acknowledgment by mortgagee.

[9] Of course if a mortgagee in possession makes any acknowledgment of the mortgagor's title, time will begin to run against the latter from such acknowledgment. As to what constitutes an acknowledgment reference may be made to the cases cited under sect. 14 (*e*), sect. 40 (*f*), and sect. 42 (*g*), as well as to the following cases under this section.

Quære whether the fact of an account being kept by a mortgagor in possession amounts to an acknowledgment under this section (*h*).

Letter containing acknowledgment

The following letter from a mortgagee in possession to the grandfather of the infant heiress of the mortgagor was held a sufficient acknowledgment :—

"Concerning the business at Hendred [the name of the mortgaged property], which you know nearly as well as myself, as there has been

(*x*) *Raffety* v. *King*, 1 Keen, 601—616.

(*y*) *Raffety* v. *King*, 1 Keen, 610—617. Compare *Browne* v. *Bishop of Cork*, 1 Dr. & Wal. 714—715.

(*z*) *Hyde* v. *Dallaway*, 2 H. 528.

(*a*) *Wynne* v. *Styan*, 1 Phil. 303—306.

(*b*) *Browne* v. *Bishop of Cork*, 1 Dr. & Wal. 700. Compare *Ward* v. *Carttar*, cited under sect. 3, *ante*.

(*c*) *Baker* v. *Wetton*, 14 Sim. 426.

(*d*) *Hood* v. *Easton*, 2 Giff. 692.

(*e*) *Ante*, p. 37.

(*f*) *Infra*, p. 89.

(*g*) *Infra*, p. 93.

(*h*) *Baker* v. *Wetton*, 14 Sim. 426.

3 & 4 Will. 4, c. 27, § 28. 37 & 38 Vict. c. 57, § 7.

nothing kept from you, which I am very willing to settle if your grand-daughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. As for Chancery, I think there is no good there. The difference is not worth much. I shall hear from your grand-daughter about the business." The bill was filed nearly seventeen years after the date of the letter (*i*).

A mortgagee who had been in possession more than twenty years wrote to the mortgagor's solicitor: "I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." Held that this was a sufficient acknowledgment of the mortgagor's title (*k*).

Letter not amounting to acknowledgment.

A letter containing the words "I deny the claim of your client," written by a mortgagee to the solicitor of a subsequent incumbrancer, in reply to a demand for an account, was held not to amount to acknowledgment (*l*).

Acknowledgment to stranger.

[10] The acknowledgment may be made to the mortgagor or his agent. An acknowledgment to a third person, *e.g.*, by the transfer of the mortgage (*m*) is not sufficient. "It is not necessary to make a person an agent, that he should have an actual authority to act. The question is whether the party who wrote the letter did not treat the party to whom it was written as the agent." *Per* SHADWELL, V.-C. (*n*).

Acknowledgment to person *acting as* agent.

Effect of proviso as to acknowledgment by one of several mortgagees in possession.

[11] These words "are directed to the case of several mortgagees, where an account taken against one will bind his interest, but not the interest of any other person. But when the mortgage is to secure money to two or more persons jointly, there must be an acknowledgment by all." *Per* MALINS, V.-C. (*o*).

"It appears to me, therefore, to be the best construction of this involved and difficult section, to hold that the provisions as to acknowledgment by some of several mortgagees apply, only, where they have separate interests either in the money or the land." *Per* MELLISH, L. J. (*p*).

[12] Accordingly it was held that where two mortgagees advance money upon a joint account, and remain in possession more than twenty years, an acknowledgment by one of them only is totally inoperative; but JAMES, L. J., expressly said, "Our decision is confined to the

(*i*) *Trulock* v. *Robey*, 12 Sim. 402.
(*k*) *Stansfield* v. *Hobson*, 3 D. M. & G. 620—623—626.
(*l*) *Thompson* v. *Bowyer*, 11 W. R. 975; 1 Not. 951.
(*m*) *Batchelor* v. *Middleton*, 3 H. 75—84.
(*n*) *Trulock* v. *Robey*, 12 Sim. 402—404
(*o*) *Richardson* v. *Younge*, L. R. 10 Eq. 280; 2 Not. 3031.
(*p*) *Richardson* v. *Younge*, L. R. 6 Ch. 481; 2 Not. 3648.

case of mortgagees who are trustees, and are shown to be such on the face of the deed" (*q*). 3 & 4 Will 4, c. 27, § 28. 37 & 38 Vict. c. 57, § 7.

Now it is quite possible that joint mortgagees, who are not trustees (*e.g.*, partners), might be in possession; and the case of an acknowledgment by one of their number is not provided for by the Act, and does not come within the above decision. It is unfortunate that "this involved and difficult section" has been re-enacted as sect. 7 of the Act of 1874, without providing for such a case, in spite of the following remarks of MELLISH, L. J.: "If the attention of the framers of the Act had been called to this point, I think they would either have provided that an acknowledgment by one should bind both, *which would have been very reasonable*, or that an acknowledgment by both should be necessary, and an acknowledgment by one wholly ineffectual" (*r*).

As regards the first alternative suggested by the Lord Justice, it may be remarked that the tendency of all recent legislation, on the subject, has been to reduce the periods of limitation; and to enable a title by mere possession to be more easily acquired. And in the case of trustees, it may have been considered unwise to allow a *cestui que trust* to be prejudiced by the act of one only of his trustees. Perhaps, also, the above decision was considered to have sufficiently settled the law. But as that decision was expressly limited to the case of trustees, it is difficult to see why some provision should not have been made for other joint mortgagees in possession. The most satisfactory solution of the difficulty might have been to enact that an acknowledgment by one of such joint mortgagees should be binding upon him, if he became the survivor within twelve years; but should otherwise be wholly ineffectual.

CORPORATIONS SOLE.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or 3 & 4 Will. 4, c. 27, § 29. Spiritual and elee-

(*q*) *Richardson* v. *Younge*, L. R. 10 Eq. 275; 2 Not. 3031; L. R. 6 Ch. 478; 2 Not. 3648.

(*r*) *Ibid*, p. 480.

3 & 4 Will. 4, c. 27, § 29.

Eleemosynary corporation sole to be barred in sixty years, or two incumbencies and six years.

distress, or to bring an action or suit to recover any land or rent[1] within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years;[2] and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.[3]

This is an exception from sect. 2.

[1] This section applies to "land or rent" only.

[2] Its practical effect is to except every spiritual or eleemosynary corporation sole from the provisions relating to private owners. Instead of being barred in twenty [or twelve] years, he will only be barred by adverse possession for (α) sixty years, or (β) two incumbencies and six years, whichever is the longest.

[3] A. sold to B. certain lands which, together with other lands, were subject to a chief rent, payable to an archbishop. A. covenanted to indemnify B. against the rent, and paid it from 1766 till 1822. On bill filed by the Archbishop in 1849, it was held that the payment of rent by A. prevented the statute from running in favour of the land sold to B. The Archbishop's right of entry under sect. 3 was held to accrue, *quâ* all the land, when the last payment of rent was made (*s*).

(*s*) *Archbishop of Dublin* v. *Lord Trimleston*, 12 I. Eq. R. 251–265; 1 Not. 2850. Compare *Woodcock* v. *Titterton*, 12 W. R. 864; and *Chinnery* v. *Evans*, p. 17, *ante*; 1 Not. 2848.

ADVOWSONS.

3 & 4 Will. 4, c. 27, § 30.

Owner of advowson to be barred by three adverse presentations or sixty years' adverse possession.

30. [1] And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

[1] Sect. 29 applies to property belonging to a benefice or other office filled by an individual; this section applies to the benefice or advowson itself, and governs the rights, not of the holder, but of the patron.

Distinction between sects. 29 & 30.

The following explanatory enactment speaks for itself:—

6 & 7 Vict. c. 54, § 3.

Bishops to be barred at the same periods as other patrons.

3. And whereas doubts have been entertained whether the several periods by the said Act [1] limited for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese; and it is expedient that all such doubts should be removed: be it therefore enacted, that the several periods limited by the said Act or by this Act for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a

3 & 4 Will. 4, c. 27, § 30.

right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice: provided always, that nothing herein contained shall be deemed to affect the right of any bishop to collate to any ecclesiastical benefice by reason of lapse.

[1] 3 & 4 Will. 4, c. 27.

3 & 4 Will. 4, c. 27, § 31.

In what cases a clerk presented by the Crown or ordinary shall be deemed to hold adversely to the patron.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by His Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by His Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

3 & 4 Will. 4, c. 27, § 32.

Proviso as to tenants in tail of advowsons.

32.[1] And be it further enacted, that in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit shall be limited accordingly.

[1] See the provisions and cases relating to tenants in tail of land or rent (*s*).

(*s*) Sects. 21—23, *ante*, pp. 47—51.

33. Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

3 & 4 Will. 4, c. 27, § 33.

Extreme period of limitation as regards advowsons fixed at one hundred years.

EXTINCTION OF TITLE.

34. And be it further enacted, that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

3 & 4 Will. 4, c. 27, § 34.

Title of person against whom full time has run to be extinguished.

"The former statutes only barred the remedy but did not touch the right; possession at all times gave a certain right; but under the new Act (*t*), when the remedy is barred, the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar." *Per* LORD ST. LEONARDS, when Lord Chancellor of Ireland (*u*).

Effect of sect. 34. It bars *right* as well as *remedy*.

(*t*) 3 & 4 Will. 4, c. 27.

(*u*) 1 Dr. & War. 289—290.

3 & 4 Will. 4, c. 27, **§ 34.**

Possession for the statutory period raises a presumption of title. Where the plaintiff in ejectment showed twenty-three years' possession and the defendant only ten years, judgment was given for the plaintiff (*v*). This was before the passing of 3 & 4 Will. 4, c. 27; and in a subsequent case, PATTESON, J. said—"The effect of the 34th section would probably be to give the right to the possessor for twenty years [or twelve years] even against the party in whom the legal estate formerly was, and, but for the Act, would still be, where he had not obtained the possession till after the twenty [or twelve] years; but then we apprehend, as before stated, that such twenty [or twelve] years' possession must be either by the same person or several persons claiming one from the other." In fact, to quote the words of PARKE, B. (*x*), "The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period has elapsed." The soundness of this view is, however, questioned by Mr. Dart (*y*).

Possession now raises a presumption of title.

Barred title cannot be revived.

Under the Real Property Limitation Act, 1874, the same effect will be produced in twelve years (*z*). After the title is extinguished by the statute, it cannot be revived by re-entry (*a*).

As before stated (*b*), the possession of a receiver does not prevent the statute from running in favour of a party to the suit (*c*). And it would seem that mere possession is *primâ facie* evidence of title against a plaintiff unless he can himself show a better title, and also against a defendant who is a mere trespasser (*d*).

Effect of possession by successive trespassers.

Semble that, at law, the continuous possession of successive independent trespassers for periods amounting in the aggregate to twenty [or twelve] years was sufficient to extinguish the title of the former owner (*e*); but no one of such trespassers who has been in possession less than twenty years can take advantage of the possession of another by adding it to his own so as to make up the statutory period (*f*).

Where trustees and their *cestuis que trustent* had been out of possession for more than twenty years, and several trespassers had held for successive periods, each of less than twenty years, LORD ROMILLY, M. R.

(*v*) *Harding* v. *Cooke*, 7 Bing. 346.

(*x*) *Jukes* v. *Sumner*, 14 M. & W. 39—42.

(*y*) V. & P., 5th ed., p. 402.

(*z*) See also *Burroughs* v. *M'Creight*, 1 Jo. & La. T. 290, and *Day* v. *Day*, L. R. 3 P. C. 751; 2 Not. 4300.

(*a*) *Brassington v. Llewellyn*, 1 F. & F. 27; 27 L. J. Ex. 297.

(*b*) Sect. 24, p. 52, *ante*.

(*c*) *Groome* v. *Blake*, 8 I. C. L. R. 428. See also cases cited at p. 52.

(*d*) *Humphrey* v. *Martin*, C. & M. 32; *Hughes* v. *Dyball*, 3 C. & P. 610; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1—5. But see *Carter* v. *Barnard*, 13 Q. B. 945.

(*e*) *Dixon* v. *Gayfere*, 17 B. 421.

(*f*) *Carter* v. *Barnard*, 13 Q. B. 945—952; *Dixon* v. *Gayfere*, 17 B. 421—431. Compare *Ex parte Winder*, 6 Ch. D. 696.

held, upon bills filed by the trustees and the heir of one of the trespassers, that the heir at law of the true owner was entitled to possession, and made a decree accordingly. At the same time he said, "At law no doubt the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in anyone, the last possessor—that is, the person actually in possession—would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." 3 & 4 Will. 4, c. 27, § 34.

This opinion was disapproved of by COCKBURN, C. J., in a subsequent case (*g*), where it appears to have been stated by mistake in argument, that Lord Romilly's *decision* was in accordance with his *opinion* upon the legal point: and it is a curious coincidence that both Mr. Dart (*h*) and Mr. Banning (*i*) represent the decision in *Dixon* v. *Gayfere* as having decreed possession to the last occupier. They appear, however, to have relied upon the erroneous statement of that decision as reported in *Asher* v. *Whitlock* (*k*); but a careful perusal of the principal case shows that Lord Romilly expressly drew a distinction between law and equity, and held that "the statute which imposes a bar against the institution of a suit after twenty years to recover possession does not impose any bar upon the Court's declaring who is entitled to an estate which is in the possession of the Court itself" (*l*). He also said, "I am of opinion, therefore, that in the circumstances of this case, which are very peculiar, *the Statute of Limitations, having conferred no right, does not apply*, and that this Court must ascertain and declare the rights of the parties exactly in the same manner as if that statute did not exist (*m*).

But where several trespassers, each claiming under his predecessor, have been in possession for periods amounting to twenty [or twelve] years, the last acquires title (*n*).

Mere possession gives an interest which may be devised by will (*o*), or descends to the heir of the possessor, if he dies intestate (*p*). The Court will force a title, depending upon possession under the statute, upon a purchaser, although the fact of such possession rests only upon affidavit evidence (*q*), and though the possession has been against the rights of the Crown (*r*).

Mere possession is a valuable interest.

Possessory title forced on a purchaser.

(*g*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1—4; 1 Not. 4463.
(*h*) V. & P., 5th ed., 403.
(*i*) Ban. Lim., 106.
(*k*) L. R. 1 Q. B. 4.
(*l*) 17 B., p. 431.
(*m*) *Ibid*, p. 432.
(*n*) *Keefe* v. *Kirby*, 6 I. C. L. R. 591; *Pritchard* v. *Jauncey*, 8 C. & P. 99.
(*o*) *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Board* v. *Board*, L. R. 9 Q. B. 48; 3 Not. 1023; *Hawksbee* v. *Hawksbee*, 11 H. 230; *Keefe* v. *Kirby*, 6 I. C. L. R. 591; *Clarke* v. *Clarke*, I. R. 2 C. L. 395.
(*p*) *Pritchard* v. *Jauncey*, 8 C. & P. 59—102.
(*q*) *Scott* v. *Nixon*, 3 Dr. & Wal. 388—406.
(*r*) *Tuthill* v. *Rogers*, 1 Jo. & La. T. 36.

3 & 4 Will. 4, c. 27, § 34.

A purchaser of a fee-farm rent under conditions providing that no objection should be taken to the title in consequence of the non-payment or non-receipt thereof, discovered that it had not been paid for twenty years. He was held bound to complete, as he had purchased only the chance of getting the rent; and the Court declined to decide whether the rent was extinguished by this section (*s*). There can be little doubt that such would now be decided to be its effect. See the remarks of LORD ST. LEONARDS upon this case (*t*). The defence of the statute may be raised by demurrer (*u*).

RECEIPT OF RENT.

3 & 4 Will. 4, c. 27, § 35.

Receipt of rent from tenant to be deemed receipt of profits.

35. And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

REAL AND MIXED ACTIONS ABOLISHED.

3 & 4 Will. 4, c. 27, § 36.

Abolition of real and mixed actions.

36. And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit

(*s*) *Hanks* v. *Palling*, 6 El. & Bl. 659.

(*t*) Sug. R. P. Stat., 2nd. ed., 9.

(*u*) *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318; 4 Not. 1131.

in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other[1] action, real or mixed (except a writ of right of dower[2] or writ of dower unde nihil habet,[2] or a quare impedit,[2] or an ejectment[3]), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.[4]

3 & 4 Will. 4, c. 27, § 36.

[1] This word is mis-spelt in the Queen's printers' copy.

[2] These actions were abolished in 1860 by 23 & 24 Vict. c. 126, sect. 26 of which is as follows:—

26. No writ of right of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *Quare impedit*, shall be brought after the commencement of this Act in any court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by a writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for freebench, or in *Quare impedit*, as the case may be.

23 & 24 Vict. c. 126, § 26.

Writs of dower and *quare impedit* abolished.

[3] The old form of action in ejectment was modified by sect. 169 of the Common Law Procedure Act, 1852 (*v*), and remained in existence until 1875, when it was practically abolished by the Judicature Acts. There is now no special form of action for the recovery of land,

Ejectment.

(*v*) 15 & 16 Vict. c. 76.

3 & 4 Will. 4, c. 27, § 36.

though the rules of court contain certain special provisions with regard to such actions (*x*).

[4] A question upon this section arose in 1848, whether debt would lie for a rent charged upon land, and POLLOCK, C. B., said: "I should be prepared to adopt, if necessary, the reasoning that, now there is no remedy by action real for the recovery of a rent in fee, there ought to be a remedy by action of debt;" while, on the other hand, ROLFE, B., observed: "I wish to guard against being considered as having expressed an opinion that debt will lie in consequence of the 3 & 4 Will. 4, c. 27, s. 36, having abolished actions real. Such reasoning is far from satisfactory to my mind. Formerly the owner of a rent-seck had no remedy for the recovery of the rent" (*y*). Under the Judicature Acts an ordinary action will lie.

REAL AND MIXED ACTIONS.

3 & 4 Will. 4, c. 27, § 37.

Saving of right to bring real and mixed actions till 1st June, 1835.

37. Provided always, and be it further enacted, that when, on the said thirty-first day of December one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June one thousand eight hundred and thirty-five, in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

3 & 4 Will. 4, c. 27, § 38.

Further saving in certain special cases.

38. Provided also, and be it further enacted, that when, on the said first day of June one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June one thousand eight hundred and thirty-five, but only within the period during which, by virtue of the pro-

(*x*) R. S. C., Ord. i. r. 1; Ord. ii. r. 3; Ord. ix. r. 8; Ord. xii. r. 18; and Ord. xix. r. 15.

(*y*) *Varley* v. *Leigh*, 2 Ex. 446—450.

visions of this Act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away. 3 & 4 Will. 4, c. 27, § 39.

Descent cast, discontinuance or warranty not to defeat right of entry.

39. And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

3 & 4 Will. 4, c. 74, s. 14, is as follows :—

3 & 4 Will. 4, c. 74, § 14.

Abolition of warranty.

14. All warranties of lands which, after the thirty-first day of December one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

MONEY CHARGED ON LAND—LEGACIES.

3 & 4 Will. 4, c. 27, § 40.

Money charged on land and legacies to be barred in twenty years till 1st Jan., 1879.

40. And be it further enacted, that after the said thirty-first day of *December* one thousand eight hundred and thirty-three no action or suit[1] or other proceeding[2] shall be brought to recover any sum of money[3] secured by any mortgage, judgment,[4] or lien,[5] or otherwise charged upon or payable out[6] of any land or rent,[7] at law or in equity, or any legacy,[8] but within twenty years next after a present right to receive[9] the same shall have accrued[10] to some person capable of giving a discharge for or release of the same,[11] unless in the meantime some part of the principal money, or some interest thereon, shall have been paid,[12] or some acknowledgment[13] of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent,[14] to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought

3 & 4 Will. 4, c. 27, § 40. but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

This section is repealed from the 1st of January, 1879, by the Real Property Limitation Act, 1874; but is re-enacted as sect. 8 of that Act, with the omission of the date of commencement, and the substitution of "twelve" for "twenty" years. Sect. 8 of the Act of 1874 is as follows:—

37 & 38 Vict. c. 57, § 8. **8.** No action or suit[1] or other proceeding[2] shall be brought to recover any sum of money[3] secured by any mortgage, judgment,[4] or lien,[5] or otherwise charged upon or payable out of any land[6] or rent,[7] at law or in equity, or any legacy,[8] but within twelve years next after a present right to receive the same[9] shall have accrued[10] to some person capable of giving a discharge for or release of the same,[11] unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Afterwards in twelve years.

Foreclosure.

[1] Foreclosure is an action for the recovery of money charged upon land within this section (*z*).

[2] "I am of opinion that the statute is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against the real or personal representatives." *Per* BRADY, C. B. (*a*).

Distinc-

[3] Sect. 40 deals with the right to recover the principal sum charged

(*z*) *Dearman* v. *Wyche*, 9 Sim. 570—575; *Henry* v. *Smith*, 2 Dr. & War. 381—387; *Du Vigier* v. *Lee*, 2 H. 326—334; *Sinclair* v. *Jackson*, 17 B. 405—410; *Sober* v. *Kemp*, 6 H. 155—160. But see *Wrixon* v. *Vize*, 3 Dr. & War. 104—120.

(*a*) *O'Hara* v. *Creagh*, L. & T. 65—73.

upon land or rent; while sect. 42 bars the right to arrears of interest in cases where the principal sum is still recoverable (*b*).

3 & 4 Will. 4, c. 27, **§ 40.** 37 & 38 Vict. c. 57, **§ 8.**

[4] "The language of the 40th section of the recent Statute of Limitations (*c*) is general. There is nothing in the word *judgment*, as there used, to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate. The intention of the legislature was that no proceeding whatever should be taken on a judgment after the lapse of twenty [now twelve] years from the time when the money secured by it became due, unless some payment should have been made on account of it, or some acknowledgment of it should have been given in writing within the period of twenty [or twelve] years." *Per* SHADWELL, V.-C. (*d*). The judgment from which this abstract is taken was delivered in 1847, and is consistent with the remarks of LORD ST. LEONARDS in a previous Irish case (*e*), where he observed that it was idle to canvass the point to what extent a judgment is a charge upon real estate, for every judgment was a potential, if not an actual charge upon land (*f*).

Distinction between these sections and s. 42.

A judgment is within this section.

[5] A vendor's lien for unpaid purchase-money is "money charged upon land" within sect. 40, and it appears that time will run from the completion of the vendor's title by evidence (*g*).

What is money charged upon land.

Where a testator gave legacies to his daughters, on condition that they should convey certain real estate to which they were entitled to his sons, which they did, it was held that they had no lien for their legacies on the real estate (*h*).

[6] A bond debt is not money "charged upon or payable out of land," although the heirs may be bound (*i*).

Quaere whether a share of the produce of real estate devised upon trust for sale and division is money charged upon land within this section (*k*). *Semble* that it is. It comes within sect. 42 (*l*).

The question what is money "charged upon or payable out of any land or rent" has also been considered in the cases cited below (*m*).

[7] As to the meaning of "rent" see notes to §§ 1, 2, 3, 7, 8, 9, and 42.

(*b*) *Henry* v. *Smith*, 2 Dr. & War. 381—384.
(*c*) 3 & 4 Will. 4, c. 27.
(*d*) *Watson* v. *Birch*, 15 Sim. 523—524.
(*e*) *Henry* v. *Smith*, 2 Dr. & War. 381.
(*f*) *Ibid.*, p. 388.
(*g*) *Toft* v. *Stephenson*, 7 H. 1, 1 D. M. & G. 28, 5 D. M. & G. 735—737.
(*h*) *Barker* v. *Barker*, L. R. 10 Eq. 438.
(*i*) *Roddam* v. *Morley*, 2 K. & J. 336. Compare *Morley* v. *Morley*, 5 D. M. & G. 610.
(*k*) *Pawsey* v. *Barnes*, 15 Jur. 943.
(*l*) *Bowyer* v. *Woodman*, L. R. 3 Eq. 313.
(*m*) *Carroll* v. *Hargrave*, I. R. 5 Eq. 123; *Baldwin* v. *Baldwin*, 4 I. Ch. R. 501; *M'Carthy* v. *Daunt*, 11 I. Eq. R. 29; *Lord Carbery* v. *Preston*, 13 I. Eq. R. 455.

3 & 4 Will. 4, c. 27, § 40. 37 & 38 Vict. c. 57, § 8.

Legacies.

[8] "Legacy" includes legacies payable out of personal estate as well as legacies charged upon land (*n*). A legatee became entitled to enforce payment of a legacy in 1815; but did not do so, although the executor had assets in hand. The executor died in 1824, having charged his real estate with payment of his debts. Held that such charge did not save the bar of the statute, so as to enable the legatee to recover in 1841 (*o*).

Lunacy of executor.

Compare sect. 25, sub-sect. 2 of the Judicature Act, 1873 (*p*) and see note [1] to sect. 25 of 3 & 4 Will. 4, c. 27 (*q*). The lunacy of a sole executrix does not prevent the statute from running against a legatee (*r*).

"Legacy" includes a share of residue.

Where a person entitled to a share of residue made no claim for thirty years, it was held in 1836, by ALDERSON, B., that the claim was clearly barred by this section (*s*). In 1841, SHADWELL, V.-C., expressed himself upon the question as follows:—

"Next: with regard to the question as to the meaning of the word 'legacy' in 3 & 4 Will. 4, c. 27, s. 40, I am inclined to think that where the Act speaks of a legacy, it does, in effect, speak of a share of a residue, and it does not make any difference between a share of a residue and a legacy. But then it appears to me to be a very important point, on which I am not bound to give an opinion now (*t*)." *Prior* v. *Horniblow* does not appear to have been cited in this case; but, in 1845, it was commented upon in the following terms:—

"With regard to the case of *Prior* v. *Horniblow* I am not entirely free from doubt; but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless having a clear opinion that it is not right, which clear opinion I cannot say that I have." *Per* KNIGHT-BRUCE, V.-C. (*u*), who held that a residuary legatee, who filed a bill twenty-eight years after the testator's death, was barred as to assets received by the executor during the first eight years, but not as to assets received during the subsequent twenty years (*x*).

Observations on 13 & 14 Vict. c. 38, s. 13.

By sect. 13 of 23 & 24 Vict. c. 38, which came into operation in 1860, a provision similar to that of sect. 40 of the Act of 1833, with regard to legacies is applied to "the personal estate or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate." In the latter part

(*n*) *Sheppard* v. *Duke*, 9 Sim. 569.
(*o*) *Piggott* v. *Jefferson*, 12 Sim. 26.
(*p*) 36 & 37 Vict. c. 66.
(*q*) *Ante*, p. 56.
(*r*) *Boldero* v. *Halpin*, 19 W. R. 320. Compare *Binns* v. *Nichols*, *infra*, p. 89.
(*s*) *Prior* v. *Horniblow*, 2 Y. & C. 200—206.
(*t*) *Christian* v. *Devereux*, 12 Sim. 264—271.
(*u*) *Adams* v. *Barry*, 2 Col. 293.
(*x*) *Ibid.*, pp. 285—290.

of that section "accounting" is added to "payment or acknowledgment" and the period of limitation is twenty years from the "last of such accountings, payments or acknowledgments." 3 & 4 Will. 4, c. 27, **§ 40.** 37 & 38 Vict. c. 57, **§ 8.**

The last mentioned enactment was held by LORD ROMILLY, M. R., to apply only to assets distributed by the administrator; and time was held to be no bar as to assets *retained* by him under the mistaken impression that he was, himself, entitled to them (*y*). It may be doubted how far this decision would apply to a case where assets had been knowingly and wrongfully retained by an administrator having regard to sect. 10 of the Real Property Limitation Act, 1874. It is observable, however, that the enactment now under discussion is not incorporated with the Real Property Limitation Acts by sect. 9 of the Act of 1874 (*z*), nor has sect. 8 of the last mentioned Act been extended—as it easily might have been—to shares of intestates' estates. The result is that the two cases will, after the 1st of January, 1879, be governed by different rules; and persons entitled to express gifts under a will, will be barred by twelve years' neglect, while those who are entitled to shares under an intestacy, will have twenty years within which to make their claims. It is difficult to find any satisfactory reason for the distinction, unless it be that persons entitled as next of kin are less likely to know of their rights than legatees.

Observations on 13 & 14 Vict. c. 38, s. 13.

Legacies barred in twelve years under new Act; but shares under intestacy in twenty.

[9] "By the words *a present right to receive the same* in the 40th section of the Act we understand an immediate right without waiting for the happening of any future event." *Per* TINDAL, C. J. (*a*).

Meaning of "present right."

"The right to a legacy and the right to receive it is quite a different thing. The right to a legacy ordinarily accrues on the death of the testator, but the right to receive does not arise until twelve months after his death. There are many cases in which legacies are vested, but no right to receive them exists until a future period, as at twenty-one or marriage." *Per* LORD ROMILLY, M. R. (*b*).

Therefore, where a legacy is given to A. for life with remainder to B., time will not run against B. till A.'s death (*c*). But the mere fact that a legacy is charged upon property subject to prior charges does not postpone the legatee's present right "to receive and give a discharge" (*d*).

Reversionary interests.

[10] It is noticeable that this section (40 of 3 & 4 Will. 4, c. 27) does not, like sect. 2, provide that the statute shall run from the *first* accrual

Time does not necessarily run

(*y*) *Reed* v. *Fenn*, 35 L. J. Ch. 464.

(*z*) *Infra*, p. 101.

(*a*) *Farran* v. *Beresford*, 10 Cl. & Fin. 319—334.

(*b*) *Earl* v. *Bellingham*, 24 B. 448—450.

(*c*) *Ibid*, *Cresswell* v. *Dewell*, 4 Giff. 460—465. Compare *M'Carthy* v. *Daunt*, 11 I. Eq. R. 29.

(*d*) *Bright* v. *Larcher*, 27 B. 130, 4 De G. & J. 608; *Proud* v. *Proud*, 11 W. R. 101. Compare *Ravenscroft* v. *Frisby*, 1 C. C. C. 16.

3 & 4 Will. 4, c. 27, § 40. 37 & 38 Vict. c. 57, § 8.

of the right (*e*) This distinction is of importance in cases where judgments, which would otherwise have been barred, are revived by *sci. fa.* and thus kept out of the operation of the statute.

Where a plaintiff recovered judgment in 1810, which was revived by *sci. fa.* in 1817, such revival was held by the House of Lords to confer a new right, which might be enforced in 1837. But as the plaintiff had declared on the judgment of 1810 instead of the *sci. fa.* of 1817 he was not allowed to set up the latter by replication (*f*).

from *first* accrual of right.

Fresh right accrues in respect of revival of judgment by *scire facias.*

The first part of this decision was followed by the House of Lords the next year in a case where a *sci. fa.* had been obtained in 1828, reviving a judgment of 1813. It was held that this conferred a new right on the plaintiff, who would not be barred under this section until 1848 (*g*).

Effect of revivor of judgments.

A judgment may be revived so as to give a new right more than twenty [or twelve] years after it was signed if any payment has been made on account in the meantime (*h*); but it is otherwise if there has been no part payment or acknowledgment (*i*).

Although a judgment revived by *sci. fa.* will still affect lands subject to the original judgment, in the hands of persons taking interests under settlements, executed after the original judgment was signed and before it was revived; the same rule does not apply to *bonâ fide* purchasers for value (*k*). But judgment on an action of debt on the same judgment does not take it out of sect. 40 (*l*).

It has been held in an Irish case (FITZGERALD, J., *dissentiente*) that a writ of revivor is not "an action on a judgment" within sect. 20 of the Common Law Procedure Act, 1853 (*m*), and is not therefore affected by sect. 14 of the Mercantile Law Amendment Act, 1856; but is still governed by sect. 40 of 3 & 4 Will. 4, c. 27 (*n*).

Person capable of giving discharge.

11 "On the whole it appears to me that the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent, out of which the interest of the charge ought to be paid is receivable by and belongs

(*e*) *Ryan* v. *Cambie*, 2 I. Eq. R. 328—330; and compare *Farran* v. *Ottiwell*, 2 Jeb. & Sy. 97—109.

(*f*) *Farran* v. *Beresford*, 10 Cl. & Fin. 319—339.

(*g*) *Farrell* v. *Gleeson*, 11 Cl. & Fin. 702. See also *Re Blake*, 2 I. Ch. R. 648.

(*h*) *Williams* v. *Welch*, 3 Dow. & Low. 565.

(*i*) *Dunne* v. *Doyle*, 10 I. Ch. R. 502. See also *Kealy* v. *Bodkin*, 9 I. L. R. 388.

(*k*) *Franks* v *Mason*, 9 I. Eq. R. 358; *Murray* v. *Clarke*, 4 I. C. L. R. 610; *Re Bodkin*, 12 I. Ch. R. 61; *Kirkwood* v. *Lloyd*, 11 I. Eq. R. 561, 12 I. Eq. R. 585. See also *Ryan* v. *Cambie*, 2 I. Eq. R. 328.

(*l*) *Walters* v. *Sidwill*, 9 I. L. R. 362—381.

(*m*) 16 & 17 Vict. c. 113.

(*n*) *Wall* v. *Walsh*, I. R. 4 C. L. 103—114.

3 & 4 Will. 4, c. 27, **§ 40.** 37 & 38 Vict. c. 57, **§ 8.**

to the same person who is entitled to the interest." *Per* LORD LANGDALE, M. R (*o*). Therefore, where the same person is entitled to an estate in the land or rent, and also to money charged thereon, the statute does not apply (*p*). But where an executor, who was also residuary legatee, became lunatic, and limited administration during his lunacy was granted to X., it was held that time, thereupon, began to run as between X. and the lunatic (*q*).

Same person entitled to land and charge.

[12] Payment of interest by a receiver of the rents of one of three estates comprised in the same mortgage, was held to keep the mortgage alive as to the other two estates (*r*).

Part payment.

Payment of interest by a widow entitled to dower out of a mortgaged estate has been held to keep the statute from running in favour of the heir (*s*). BACON, V.-C., in a recent case (*t*) observed: "Although, where the same person holds two perfectly distinct characters it may be necessary to distinguish in which of the two characters the payment was made, yet, as was held in *Fordham* v. *Wallis* (*u*) 'what we have to consider in these cases is the act of the person and not the position of the estate, for the existence, or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property'" (*x*).

Payment of one legacy by an executor out of his own moneys does not amount to an admission of assets in favour of other legatees (*y*).

What is an acknowledgment within s. 40.

[13] A purchaser died without having paid his purchase money, and devised the purchased land to trustees who disclaimed. New trustees having been appointed by the Court, their solicitor wrote to the vendor's solicitor that the purchase money was ready to be paid and was lying at banker's interest. This was held a sufficient acknowledgment (*z*). The following letter, written by the daughter of a trustee for sale at his dictation was held an acknowledgment, under sect. 40, binding upon the *cestui-que-trust*:—"I regret that it is not in my power to return you a more satisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady

Admission in letter.

(*o*) *Burrell* v. *Earl of Egremont*, 7 B. 203—235. Compare *Lord Kensington* v. *Bouverie*, 7 D. M. G. 134—148; *Faulkner* v. *Daniel*, 3 H. 199; *Lord Carbery* v. *Preston*, 13 I. Eq. R. 455.

(*p*) See *Lord Kensington* v. *Bouverie*, 7 D. M. G. 134—148; *Faulkner* v. *Daniel*, 3 H. 199; *Lord Carbery* v. *Preston*, 13 I. Eq. R. 455.

(*q*) *Binns* v. *Nichols*, L. R. 2 Eq. 256—260.

(*r*) *Chinnery* v. *Evans*, 11 H. L. C. 115. Compare *Dickenson* v. *Teasdale*, 1 De G. J. & S. 52.

(*s*) *Ames* v. *Mannering*, 26 B. 583.

(*t*) *Pears* v. *Laing*, L. R. 12 Eq. 41—54.

(*u*) 10 H. 228.

(*x*) Compare *Seager* v. *Aston*, 8 Jur. N. S. 481; 5 W. R. 548, and see also *Staley* v. *Barrett*, 26 L. J. Ch. 321.

(*y*) *Cadbury* v. *Smith*, L. R. 9 Eq. 37.

(*z*) *Toft* v. *Stephenson*, 1 D. M. G. 28—33—40.

3 & 4 Will. 4, c. 27, § 40.

St. John. Be assured I shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power" (*a*).

Master's report.

A statement in a Master's Report was held not to amount to an acknowledgment, inasmuch as the master was not the agent of both parties (*b*); but it appears from the judgment of LORD ST. LEONARDS in a subsequent case (*c*) that the creditor in that case was not a party to the suit in which the report was made. And this decision was questioned in another case (*d*) where it was held that the insertion of a debt in an insolvent's schedule was a sufficient acknowledgment (*e*).

Insolvents' schedule.

Admission in affidavit or answer.

An admission in a schedule (*d*), affidavit (*f*), or answer is an acknowledgment, at any rate in favour of a creditor who is a party to the action in which such admission is made (*g*).

Admission by will.

An admission of indebtedness by will is a sufficient acknowledgment (*h*).

In addition to these cases, the reader should refer to the decisions cited under sect. 42 of 3 & 4 Will. 4, c. 27 (*i*), which is worded similarly to sect. 40. Reference may also be made to sects. 14 and 28 (*k*) and the notes thereto (*l*).

"Agent" part payment by.

[14] "There is no doubt that a payment of a part of the principal or some interest by a person expressly or impliedly authorized to make the payment, will be equivalent to a payment by the party liable. . . . . The payment, however, cannot be by a mere stranger." *Per* CUSACK SMITH, M. R. (*Ireland*) (*m*).

Who is agent for the purpose of giving acknowledgment.

An acknowledgment by trustees is binding on their *cestui-que-trust* (*n*), and the same rule applies to trustees appointed by the Court in the place of disclaiming trustees (*o*).

A solicitor is an agent within sect. 40 (*p*).

ARREARS OF DOWER.

3 & 4 Will. 4, c. 27, § 41.

41.[1] And be it further enacted, that after the said thirty-first day of December one thousand eight hundred

(*a*) *Lord St. John* v. *Boughton*, 9 Sim. 219—225.
(*b*) *Hill* v. *Stawell*, 2 I. L. R. 302.
(*c*) 3 Dr. & War. 223.
(*d*) *Barrett* v. *Birmingham*, 4 I. Eq. R. 537.
(*e*) See also *Morrogh* v. *Power*, 5 I. L. R. 494, and *Hannan* v. *Power*, 8 I. L. R. 505.
(*f*) *Tristram* v. *Hart*, L. & T. 186—191.
(*g*) *Blair* v. *Nugent*, 3 J. & La. T. Ch. R. 236.
(*h*) *Millington* v. *Thompson*, 3 I.
(*i*) P. 98, *infra*.
(*k*) Pp. 37 and 71, *ante*.
(*l*) See also *Vincent* v. *Willington*, L. & T. 456.
(*m*) *Homan* v. *Andrews*, 1 I. Ch. R. 106—112.
(*n*) *Lord St. John* v. *Boughton*, 9 Sim. 219—225.
(*o*) *Toft* v. *Stephenson*, 1 D. M. G. 28.
(*p*) *Toft* v. *Stephenson*, 1 D. M. G. 28.

and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.[2]

3 & 4 Will. 4, c. 27, § 41.

Only six years' arrears of dower recoverable.

[1] This section is not affected by the Real Property Limitation Act, 1874.

[2] Where the widow of a tenant in tail in possession waited for thirty-one years after his death before filing a bill to establish her right to dower, and the heir in tail had been in possession, the bill was dismissed with costs (*q*).

MONEY CHARGED ON LAND—ARREARS OF INTEREST.

42. [1]And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears[2] of rent[3] or of interest[4] in respect of any sum of money charged upon[5] or payable out of any land[6] or rent, or in respect of any legacy,[7] or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years[8] next after the same respectively shall have become due, or next after an acknowledgment[9] of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer[10] shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during

3 & 4 Will. 4, c. 27, § 42.

Only six years' arrears of rent or interest to be recoverable.

(*q*) *Marshall* v. *Smith*, 5 Giff. 37.

3 & 4 Will. 4, c. 27, § 42.

the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.[11]

[1] This section is not retrospective (*r*) except as regards acknowledgments (*s*).

Fee farm rent.

[2] "The 2nd section contemplates and provides for the case where the right or title to the annuity itself is disputed. . . . . The 42nd section contemplates and provides for the case, where the title to the annuity is not disputed, but the distress is made for arrears due." *Per* TINDAL, C. J. (*t*). A fee farm rent is within this section and is not affected by 3 & 4 Will. 4, c. 42, s. 3 (*u*). It has been held that a tithe rent charge is within sect. 42 of 3 & 4 Will. 4, c. 27 (*x*); although now only two years' arrears are recoverable under 6 & 7 Will. 4, c. 71, s. 82 (*y*).

Meaning of "rent" in this section.

[3] "A reference to the rents specified in the 1st section of the statute shows that the arrearages of rent mentioned in sect. 42 have no relation to a conventional rent reserved on a lease. . . . I should say it was proposed to include other rents of the same nature as those to which the Act by its title and preamble, was intended to apply, rather than conventional rents reserved on a lease." *Per* TINDAL, C. J., who, however (*z*), said that it was unnecessary to give an opinion on the point as the case then before him was within 3 & 4 Will. 4, c. 42, s. 3, which must be considered an exception out of the section under discussion (*a*).

This section applies to interest of moneys included in s. 40.

[4] "That section (*b*) therefore provides that the principal shall not be recoverable after 20 [now 12] years except in the several cases enumerated therein: then follows the 42nd section, which embraces only the interest of the sums provided for in the 40th section." *Per* LORD ST. LEONARDS (*c*).

"Charge" includes mortgage.

[5] "Although the word *charge* does not by its own force include mortgages, yet, as the 40th clause expressly mentions mortgages, they must be included in the 42nd, from the necessity of construing the two clauses by reference to each other." *Per* STUART, V.-C. (*d*).

(*r*) *Paddon* v. *Bartlett*, 3 A. & E. 884—895; *Peyton* v. *M'Dermott*, 1 Dr. & War. 198.

(*s*) *Vincent* v. *Willington*, L. & T. 456—469.

(*t*) *James* v. *Salter*, 3 Bing. N. C. 544—552.

(*u*) See note [8], *infra*. *Humfrey* v. *Wade-Gery*, 7 C. B. 567.

(*x*) *Eccl. Com.* v. *Marquis of Sligo*, 5 I. Ch. R. 46.

(*y*) *Re Camberwell Rent Charge*, 4 Q. B. 151.

(*z*) *Paget* v. *Foley*, 2 Bing. N. C. 688—9.

(*a*) See note [8], *infra*.

(*b*) Sect. 40 of 3 & 4 Will. 4, c. 27.

(*c*) *Hughes* v. *Kelly*, 2 Dr. & War. 482—489.

(*d*) *Bolding* v. *Lane*, 3 Giff. 561—574.

[6] A mortgagee of turnpike tolls was held entitled to recover more than six years' arrears, on the ground that such tolls are not an interest in land within the statute (*e*). On the other hand, a mortgage of a canal, works and rates, was held within this section (*f*). See notes of these cases under sect. 1 (*g*).

Debts secured by judgments are also within this section, and only six years' arrears of interest can be recovered (*h*).

In a case where many years elapsed between a contract for sale and completion, it was held that interest on the unpaid purchase money, although it would run from the contract, would not become payable until a good title was shown. "It is upon completion that interest becomes due, although to be calculated from the inception of the contract." *Per* TURNER, L. J. (*i*). Therefore it would seem that a vendor who allowed more than six years to elapse *after completion* without enforcing payment of his purchase money, could only recover six years' arrears.

Arrears of annuities are within this section if charged on land.

An annuity charged upon land is within this section (*k*) being included in the term "rent" (*l*), but an annuity not charged upon land (*m*), but charged upon personal estate (*n*), or secured by bond (*o*), is not.

Interest on legacies.

[7] Where a legacy had remained unpaid for more than thirty years it was held that interest was only payable for six years (*p*), and the interest is to be calculated from the filing of the bill (now the issue of the writ), although it may not be filed (or issued) by the legatee (*q*). Where a lunatic had received the interest of a legacy for more than twenty years by mistake it was held that the legatee could only recover six years' arrears of interest (*r*).

Conflict between 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3.

[8] Where money is simply "charged upon or payable out of land or rent" the arrears fall clearly within sect. 42 of 3 & 4 Will. 4, c. 27, as the cases cited below will show. But if such arrears, or the money in respect of which they have accrued, are collaterally secured—for instance by covenant, bond, or a charge upon personal

(*e*) *Mellish* v. *Brooks*, 3 B. 22—28.

(*f*) *Hodges v. Croydon Canal Co.*, 3 B. 81—89.

(*g*) *Ante*, p. 6.

(*h*) *Henry* v. *Smith*, 2 Dr. & War. 381.

(*i*) *Toft* v. *Stephenson*, 5 D. M. G. 735—739.

(*k*) *Uppington* v. *Tarrant* 12 I. Ch. R. 262; *Francis* v. *Grover*, 5 H. 39; *Hunter* v. *Nockolds*, 1 M. & G. 640.

(*l*) *Ferguson* v. *Livingston*, 9 I. Eq. R. 202.

(*m*) *Roch* v. *Callen*, 6 H. 531—536.

(*n*) *Re Ashwell*, Joh. 112.

(*o*) *Sims* v. *Thomas* and *Strachan* v. *Thomas*, 12 A. & E. 536.

(*p*) *Hughes* v. *Williams*, 3 M. & G. 683—688.

(*q*) *Chappell* v. *Rees*, 1 D. M. G. 393—398.

(*r*) *Re Walker*, L. R. 7 Ch. 120—123.

3 & 4 Will. 4, c. 27, § 42.

estate—a question arises as to the effect of the statute 3 & 4 Will. 4, c. 42, s. 3, which is as follows :—

3 & 4 Will. 4, c. 42, § 3.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant, or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after, (that is to say,) the said *actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond* or other specialty actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or *within twenty years after the cause of such action or suit*, but not after; the said actions by the party grieved one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.

Effect of the two enactments as regards money charged on land, and also collaterally secured by bond or covenant.

The Act from which this section is taken, received the royal assent *after* 3 & 4 Will. 4, c. 27, but came into operation before it; and it will be seen that the words in italics seem to include some cases which are within sect. 42 of the earlier statute. The question has often been raised whether arrears which are within both enactments are recoverable for twenty years, or only for six years; and the result appears to be that *as against the land* only six years can be recovered, while the arrears for the preceding fourteen years can be

recovered in a personal action. Where an annuity was charged upon the testators' *freehold and leasehold estates* it was held that arrears were only recoverable for six years (*s*).

3 & 4 Will. 4, c. 27, § 42.

Where a mortgage of a canal, works, and rates contained no covenant for payment of interest it was held that the mortgagee could only recover six years' arrears (*t*).

3 & 4 Will. 4, c. 42, § 3.

Similarly the mortgagee of a married woman's reversionary interest was held entitled to no more than six years' arrears. LORD HATHERLEY (then V.-C. Wood) remarked, "I put the covenant entirely aside, it being the covenant of a married woman" (*u*).

Where mere charge on land only six years' arrears recoverable.

Of course, in cases which do not fall within sect. 42 of 3 & 4 Will. 4, c. 27, twenty years' arrears are recoverable under the later statute. And in one case where annuities charged upon personal estate had been only partially paid the annuitants were allowed to recover arrears of the unpaid balances for thirty-seven years (*x*). So, arrears of an annuity secured by bond are recoverable for twenty years (*y*). And when a lease contains a covenant for payment of rent, the lessor may recover arrears for twenty years, by action on the covenant under the later statute (*z*). Similarly it has been held that when a mortgage contains a covenant for payment the mortgagee may recover twenty years' arrears of interest by action on the covenant (*a*). But where annuities, rents and interest on mortgages have been secured by covenant, and also charged on land, the question has arisen whether an action on the covenant is necessary or whether the statute 3 & 4 Will. 4, c. 42, does not so far repeal 3 & 4 Will. 4, c. 27, s. 42, as to render twenty years' arrears recoverable in a suit (or an action) to charge the land; and although the decisions are somewhat conflicting, it may be considered as settled that—at any rate before the Judicature Acts—only six years' arrears could be recovered in an action against the land. But see now R. S. C., Ord. 17, rr. 1 and 2. As regards mortgages a distinction has been drawn between suits for foreclosure and redemption, and the following opinion upon the point was expressed by KINDERSLEY, V.-C.: "The intention of the legislature I think was that if a man chose to let interest run into arrear for more than six years, and then came to a court of justice to recover the interest, he shall only be entitled to recover six years' interest; but it does not follow that the legislature intended

Where no charge on land twenty years' arrears recoverable.

Where both charge on land and covenant twenty years' arrears recoverable by action on the covenant; but not in action to enforce security.

Foreclosure and redemption stand on the same footing.

(*s*) *Francis* v. *Grover*, 5 H. 39—49.

(*t*) *Hodges* v. *Croydon Canal Co.*, 3 B. 86—90.

(*u*) *Bowyer* v. *Woodman*, L. R. 3 Eq. 313—315.

(*x*) *Re Ashwell*, Joh. 112—116.

(*y*) *Sims* v. *Thomas*, *Strachan* v. *Thomas*, 12 A. & E. 536—538.

(*z*) *Paget* v. *Foley*, 2 Bing. N. C. 679.

(*a*) *Sinclair* v. *Jackson*, 17 B. 405; *Elvy* v. *Norwood*, 2 De G. & S. 240; *Du Vigier* v. *Lee*, 2 H. 326.

3 & 4 Will. 4, c. 27, § 42, 3 & 4 Will. 4, c. 42, § 3.

that a mortgagor who has lost his legal right and comes to the court insisting on his equity to redeem should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute" (*b*). But the law may now be considered as settled in accordance with the rule laid down by WIGRAM, V.-C., as follows:—

"It has always appeared to me that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same whether they are to be ascertained in a suit for redemption or for foreclosure" (*c*). So that, *as against the land*, only six years' arrears can be recovered either in foreclosure or redemption proceedings (*d*), although the mortgage is of a reversion (*e*). In some cases, however, a mortgagee has been allowed to tack his remedy on the covenant to his charge on the land as against the heirs of the mortgagor, although it was said that he could not do so against the mortgagor himself (*f*). And when a fund was in court in an administration suit it was held, on petition by a mortgagee, that he was entitled to more than six years' arrears of interest (*g*). But in a more recent case where money had been paid into court under the Lands Clauses Consolidation Act, it was held, on the petition of an equitable mortgagee of the land purchased, that he was only entitled to six years' arrears of interest. In giving judgment, MALINS, V.-C., commented on the last cited case in these terms:—

Mortgagee may tack remedy on covenant to mortgage in some cases.

"In *Edmunds* v. *Waugh* the position of the parties was as if the mortgagee had the money actually in his hands as mortgagee, and what V.-C. KINDERSLEY really dealt with was the right of retainer, and he held that the petition which in effect put the mortgagee in possession of funds which really belonged to him was not a suit to recover interest within the meaning of the Statutes of Limitation" (*h*).

And even where a mortgaged estate had been sold under a power of sale, it was held by LORD ROMILLY that the mortgagee could only retain six years' arrears as against the mortgagor (*i*).

This case was, however, compromised on appeal by payment of

(*b*) *Edmunds* v. *Waugh*, L. R. 1 Eq. 418—421.

(*c*) *Sober* v. *Kemp*, 6 H. 155—160.

(*d*) *Round* v. *Bell*, 30 B. 121; *Shaw* v. *Johnson*, 1 Dr. & S. 412—415; *Elvy* v. *Norwood*, 2 De G. & S. 240; *Hughes* v. *Kelly*, 2 Dr. & War. 482; *Du Vigier* v. *Lee*, 2 H. 326.

(*e*) *Sinclair* v. *Jackson*, 17 B. 405. But compare *Wheeler* v. *Howell*, 3 K. & J. 201.

(*f*) *Sinclair* v. *Jackson*, 17 B. 405; *Du Vigier* v. *Lee*, 2 H. 326; *Elvy* v. *Norwood*, 2 De G. & S. 240.

(*g*) *Edmunds* v. *Waugh*, L. R. 1 Eq. 418.

(*h*) *Re Stead's Mortgage*, 2 Ch. D. 713—717. Compare *Re Walker*, L. R. 7 Ch. 126.

(*i*) *Mason* v. *Broadhurst*, 33 B. 296.

less than one-third of the amount claimed, and it was subsequently disapproved of by KINDERSLEY, V.-C., in *Edmunds* v. *Waugh*. Where an annuity was charged upon land and also secured by covenant it was held that the annuitant, in a suit to enforce the charge against the land, could only recover six years' arrears from the time when he brought in his claim (*k*). This case may be taken to have overruled *Du Vigier* v. *Lee* (*l*), and the result thus arrived at is lucidly stated by LORD ROMILLY, M. R. (*m*), in these words:—

3 & 4 Will. 4, c. 27, § 42. 3 & 4 Will. 4, c. 42, § 3.

"After some fluctuations of decisions it was finally decided by the LORD CHANCELLOR COTTENHAM in *Hunter* v. *Nockolds* that effect was to be given to both statutes and to both clauses, that neither overruled the other, and that, accordingly, as against the estate on which an annuity or a mortgage was charged no more than six years' arrears could be recovered *against the estate*, but that in an *action of covenant* against the covenantor twenty years' arrears of annuity or interest of a mortgage might be recovered, but that they formed no charge on the estate beyond the six years'. The judgment when recovered would constitute a charge on the real estate of the defendant in the action, but this does not affect the principle." In the case thus referred to LORD COTTENHAM also said (*n*), "The provisions of the two (Acts) must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person. . . . . In some of the cases which have arisen under these Acts the courts have treated this provision of the second Act as an exception out of the enactment of the former; the conjoined enactments would, in that case, be that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by any distress action or suit other than, and except, in actions upon covenant or debt upon specialty, in which cases the limitation shall be twenty years."

Result of the decisions on this point.

This, however, is scarcely a satisfactory solution of the difficulty, and the following remarks of LORD ST. LEONARDS, when Lord Chancellor of Ireland, will be endorsed by no inconsiderable proportion of the profession:—"I must say it is most desirable that the legislature should clear up the difficulties which they themselves have created, for it seems difficult to reconcile the two statutes (*o*)." This has not been done by the Real Property Limitation Act, 1874; and it remains to be seen whether the Judicature Acts

(*k*) *Hunter* v. *Nockolds*, 1 M. & G. 640. Compare *Harrison* v. *Duignan*, 2 Dr. & War. 295.
(*l*) 2 H. 326.
(*m*) *Lewis* v. *Duncombe*, 29 B. 175—187.
(*n*) 1 M. & G. 640—652.
(*o*) *Vincent* v. *Going*, 1 Jo. & La. T. 703.

3 & 4 Will. 4, c. 27, § 42. 3 & 4 Will. 4, c. 42, § 3.

will have the effect of solving or increasing the difficulties that previously existed. Compare sect. 10 of the Real Property Limitation Act, 1874 (*p*) with sect. 25, subsect. 2 of the Judicature Act, 1873 (*q*), and see R. S. C. Ord. XVII., rr. 1 and 2, as to joinder of causes of action.

What amounts to an acknowledgment within this section.

[9] A letter in 1833 from the treasurer of a company to a mortgagee contained the following sentences:—"No interest has been paid since 1821 to the government, nor to anyone that holds securities, nor is it likely while matters remain as they now are . . . . What a future day may produce is quite uncertain; but as an individual I have some ground to think we may yet see better days . . . . I am at all times willing and happy to give you or any other gentleman that has embarked property in the present important undertaking, any information I am able and you require." This was held to give a right of action within six years (*r*). It has been laid down that an acknowledgment, to be binding must be made with a view of making the person giving it liable; and not with a view of explaining that some other person is liable (*s*).

A recital in a transfer of a mortgage is an acknowledgment binding upon the parties. But a recital that more than six years' arrears of interest were due, though binding upon the mortgagor, who was a party, was held not binding upon a subsequent mortgagee, who was not a party to the transfer (*t*). An acknowledgment to a stranger is not binding (*u*). An acknowledgment by a tenant for life of a settled estate, as to an arrear of interest due on a mortgage affecting the inheritance, was held by CUSACK SMITH, M.R., in an Irish case, to be binding upon the remaindermen (*x*).

Acknowledgment to stranger not binding.

And, of course, an acknowledgment to a third person as agent of the creditor is sufficient. See the notes to sects. 14, 28 and 40 (*y*).

What constitutes a "prior incumbrancer."

[10] A judgment creditor is a "prior incumbrancer." *Per* LORD ST. LEONARDS (*z*). But outstanding charges assigned to a trustee for a purchaser of the equity of redemption are not within the exception (*a*).

This section does not apply to annuities charged upon a reversionary interest in land; for time does not run until such interest falls into possession (*b*). On the other hand, it has been held that

(*p*) 37 & 38 Vict. c. 57.
(*q*) 36 & 37 Vict. c. 66.
(*r*) *Jortin* v. *S. E. Ry. Co.*, 6 D. M. & G. 270—290.
(*s*) *Holland* v. *Clark*, 1 Y. & C. Ch. 151—169.
(*t*) *Bolding* v. *Lane*, 1 D. J. & S. 122.
(*u*) *Holland* v. *Clark*, 1 Y & C. Ch. 151—170; *Grenfell* v. *Girdlestone*, 2 Y. & C. 662—676.
(*x*) *Re Fitzmaurice*, 15 I. Ch. R. 445; 1 Not. 4386.
(*y*) Pp. 37, 71, and 89, *ante*.
(*z*) *Henry* v. *Smith*, 2 Dr. & War. 381—390.
(*a*) *Chinnery* v. *Evans*, 11 H. L. C. 115—136—140; 1 Not. 2848—9.
(*b*) *Wheeler* v. *Howell*, 3 K. & J. 198—201.

the mortgagee of a reversion (*c*), or the judgment creditor of a remainderman is not entitled, under this section, to recover more than six years' arrears of interest which accrued due during the possession of the tenant for life (*d*). 3 & 4 Will. 4, c. 27, § 42. 3 & 4 Will. 4, c. 42, § 3.

"The exception in the statute is merely that while a prior incumbrancer is in possession, his possession shall not prejudice a subsequent incumbrancer, who is waiting, and comes in in reasonable time, to make the fund available for the payment of his demand." *Per* LORD ST. LEONARDS (*e*). And a tenant for life is not a "prior incumbrancer" as regards a creditor of a remainderman (*f*).

Claim in a pending action is equal to bringing an action.

[11] Where a judgment creditor carries in a claim in a suit or action he is entitled, under this section, to arrears of interest for six years, prior to the carrying in of his claim (*g*). As to the operation of a pending suit or action, in which claims can be made, upon rights which would otherwise have been barred, see notes to sect. 24 (*h*). Where the mortgagees of a tenant for life entered into possession under an order in a suit, and remained in possession for nine years after the death of the tenant for life (such death being unknown to both parties), it was held by the Court of Appeal, on the petition of the remainderman, reversing the decision of HALL, V.-C. (*i*), that they were only entitled to an account of the rents and profits for six years previous to the presentation of their petition (*k*). The statute was held to be no bar to a mortgagor's right to recover damages for coal which a mortgagee in possession had allowed trespassers to abstract from under the mortgaged property (*l*). The rule that an infant may treat a person who enters on his land during his minority as his bailiff, takes such cases out of this section (*m*).

Infants.

SPIRITUAL COURTS.

43. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred 3 & 4 Will. 4, c. 27, § 43.

(*c*) *Sinclair* v. *Jackson*, 17 B. 405.

(*d*) *Vincent* v. *Going*, 1 Jo. & La. T. 697—701.

(*e*) *Vincent* v. *Going*, 1 J. & La. T. 697—703.

(*f*) *Ibid.* See also *Drought* v. *Jones*, 2 I. Eq. R. 303, and *Montgomery* v. *Southwell*, 2 Con. & Law. 263.

(*g*) *Greenway* v. *Bromfield*, 9 H. 201—204.

(*h*) P. 52, *ante*.

(*i*) 2 Ch. D. 617.

(*k*) *Hickman* v. *Upsall*, 4 Ch. D. 144.

(*l*) *Hood* v. *Easton*, 2 Giff. 692. Compare *Dean* v. *Thwaite* and *Ecclesiastical Commissioners* v. *N. E. R. Co.*, cited under sect 26, p. 63, *ante*.

(*m*) See *Nanney* v. *Williams*, 22 B. 452, and notes to sects. 3 and 16, *ante*, pp. 12 and 41.

3 & 4 Will. 4, c. 27, § 43. Spiritual courts to be bound by Act.

and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

EXTENT OF ACTS.

3 & 4 Will. 4, c. 27, § 44. Act not to extend to Scotland.

44. Provided always, and be it further enacted, That this Act shall not extend to Scotland; *and shall not, so far as it relates to any right to permit* [1] *to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland* [2].

[1] *Lege* "present."

Ireland. [2] The excepted portion of the Act 3 & 4 Will. 4, c. 27, was extended to Ireland in 1843 and 1844 (*n*), and remained in operation there till the passing of the Irish Church Act, 1870 (*o*), sect. 10 of which makes it again inapplicable. The Act 3 & 4 Will. 4, c. 27, applies to New South Wales (*p*), but not to Jamaica (*q*). In India the time of limitation is twelve years (*r*) as regards land, and six years (*s*) as regards other actions. As to Canada, see *Herrick* v. *Sixby* (*u*) and *Macdonald* v. *Lambe* (*x*).

Colonies. India. Canada.

3 & 4 Will. 4, c. 27, § 45.

45. And be it further enacted, That this Act may be amended, altered, or repealed during this present session of parliament.

See 3 & 4 Will. 4, c. 42, s. 3, and notes thereto (*t*).

ACTS OF 1833 AND 1874 CONSOLIDATED.

37 & 38 Vict. c. 57, § 9.

9. From and after the commencement of this Act all the provisions of the Act passed in the session of the

(*n*) 6 & 7 Vict. c. 54; 7 & 8 Vict. c. 27.
(*o*) 32 & 33 Vict. c. 42.
(*p*) *Day* v. *Day*, L. R. 3 P. C. 751; 2 Not. 4300.
(*q*) *Pitt* v. *Lord Dacre*, 3 Ch. D. 295.
(*r*) *Re Peat's Trusts*, L. R. 7 Eq. 302; 2 Not. 1569.
(*s*) *Hay* v. *Gordon*, L. R. 4 P. C. 337; 3 Not. 268.
(*t*) *Ante*, p. 94.
(*u*) L. R. 3 P. C. 436.
(*x*) L. R. 3 P. C. 539.

third and fourth years of the reign of His late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this Act, and shall take effect as if the provisions hereinbefore contained were substituted in such Act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of His late Majesty King William the Fourth, and the first year of the reign of Her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

37 & 38 Vict. c. 57, §§ 9, 11, 12.

Portions of 3 & 4 Will. 4, c. 27, repealed, and remaining portions to be construed with Act of 1874.

11. This Act may be cited as the "Real Property Limitation Act, 1874."

Short title of Act of 1874.

12. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.

Commencement of Act of 1874.

ILLUSORY APPOINTMENTS.

11 Geo. 4 & 1 Wm. 4, c. 46.
37 & 38 Vict. c. 37.

SUMMARY.

ALL powers of appointment are either exclusive or non-exclusive. Under an exclusive power, the appointor has a discretion to appoint the whole fund to one or more objects of the power, to the exclusion of the others. But under a non-exclusive power, exercised before the 30th of July, 1874, he was bound to appoint a portion of the fund to every object of the power. Prior to the 16th of July, 1830, it was immaterial, at law, how small the share appointed to any object might be; but in equity it was necessary to appoint a *substantial* share to each object. As regards powers exercised after the 16th of July, 1830, the Act 11 Geo. 4 & 1 Will. 4, c. 46, intituled "An Act to alter and amend the law relating to illusory appointments," rendered illusory appointments, *i.e.*, appointments of merely nominal shares, good in equity as well as at law. The recent "Act to alter and amend the law as to appointments under powers not exclusive" (37 & 38 Vict. c. 37), in effect, renders every power of appointment exercised after the 30th of July, 1874, exclusive, unless there is an express declaration to the contrary in the instrument creating the power.

11 GEO. 4 & 1 WILL. 4, c. 46.

An Act to alter and amend the Law relating to Illusory Appointments.[1] [16*th July*, 1830.]

1 Will. 4, c. 46, § 1.

Preamble.

WHEREAS, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property:[2] And whereas appointments in exercise of such powers, whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law:[3] And whereas considerable inconvenience[4] hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law;[5] be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no appointment, which from and after the passing of this Act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take more than an

Inconvenience of equitable rule.

Illusory appointments to be valid in Equity as well as at Law.

1 Will. 4, c. 46, § 1.

unsubstantial, illusory, or nominal share of the property subjected to such power.[6]

[1] This Act is retrospective in this sense, that it applies to powers created before, but exercised after, the 16th of July, 1830. *Per* LORD ROMILLY, M.R. (*a*). The old law consequently applies to all powers exercised before that date.

LAW PRIOR TO 1830.

Exclusive and non-exclusive powers.

[2] Of course, where the power was so expressed as to give the appointor a discretion to exclude any one or more of the objects —*e.g.*, "to such of my children as A. shall think fit"—no difficulty arose. Such a power was called exclusive. But where the power was non-exclusive—*e.g.*, "to all and every my children, in such shares as A. shall appoint"—it was held, both at law and in equity, that some share must be appointed to every object of the power.

Old rule at law.

[3] At law the amount of the share appointed to any object was immaterial—no appointment, however small, was considered illusory (*b*).

Rule in equity before 1830.

But in equity, the rule prior to 1 Will. 4, c. 46, is thus stated by the present MASTER OF THE ROLLS :—

"When a power was given to appoint among a class in such parts or shares as the appointor should direct it was held not irrationally that the meaning of the person creating the power was that the appointor should appoint a substantial share to each object of the power" (*c*).

Inconvenience of equitable rule.

[4] This inconvenience arose from the fact that it became necessary for the Court, in every case which came before it, to decide what amounted to a "substantial" and what to a nominal or "illusory" share—"No one knew exactly how much a substantial portion of the property was, and it was impossible to say without resorting to litigation what the least sum was, which the appointor was authorized to appoint." *Per* JESSEL, M.R. (*d*).

Cases as to illusory appointments before 1830.

The following are instances of appointments that were held illusory, and therefore bad: Five shillings (*e*); 1*l.* to one child and 1999*l.* to another (*f*); 5*l.* and 9*l.* out of a fund of 4000*l.* (*g*); 10*l.* out of a fund of nearly 1900*l.* (*h*); 10*l.* 10*s.* where the fund exceeded 2000*l.* (*i*); one acre of land (*k*).

(*a*) *Reid* v. *Reid*, 25 B. 480.
(*b*) *Morgan* v. *Surman*, 1 Taunt. 289, 298.
(*c*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 405, 406; 3 Not. 1145.
(*d*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 405, 407; 3 Not. 1145.
(*e*) *Gibson* v. *Kinven*, 1 Ver. 66.
(*f*) *Lysaght* v. *Royse*, 2 Sch. & L. 151.
(*g*) *Spencer* v. *Spencer*, 5 Ves. 362.
(*h*) *Kemp* v. *Kemp*, 5 Ves. 849.
(*i*) *Vanderzee* v. *Aclom*, 4 Ves. 771.
(*k*) *Pocklington* v. *Bayne*, 1 Bro. C. C. 450.

On the other hand, the following appointments were held valid: 33*l.* 6*s.* 8*d.* where the fund amounted to 2500*l.* (*l*); 71*l.* to one object and 5500*l.* to another (*m*); 100*l.* to one son (an uncertificated bankrupt) and 2400*l.* to another (*n*); 200*l.* out of a fund exceeding 25,000*l.* (*o*). 1 Will. 4, c. 46, § 1.

A reversionary interest was considered an illusory share (*p*). But in deciding whether a share was illusory or not the Court would consider the circumstances of the case (*q*), and the appointment of a very small sum might be upheld if the child had been guilty of gross misbehaviour (*r*), or was otherwise provided for (*s*) either by the appointor (*t*) or *aliunde* (*u*). A power to appoint real and personal estate was well exercised by appointing real estate to some objects and personalty to the others (*x*).

[5] LORD ELDON, in 1812, strongly disapproved of the equitable rule, and thought that any appointment good at law ought not to be considered illusory in equity, but considered himself bound by authority. The expediency of the rule had also been questioned, on several occasions, by other judges.

LAW BETWEEN 1830 AND 1874.

[6] "The statute (*y*) made the appointment of a nominal or illusory share, which was a valid appointment at law, valid also in equity; but it did not make that which was an invalid appointment both at law and in equity, because some of the objects were excluded, valid in equity." *Per* CUSACK SMITH, M. R. (*Ireland*) (*z*). Effect of the Act of 1830.

"The statute requires a share, however small, to be given to each of the objects of the power." *Per* LORD HATHERLEY, C. (*a*).

"The rule is that there must be, at least a farthing, payable out of the fund subject to the power; and, as I said before, however small the sum appointed may be, the appointment cannot be objected to as illusory." *Per* JESSEL, M. R. (*b*).

Accordingly, the appointment of a square yard of real estate to

(*l*) *Mocatta* v. *Lousada*, 12 Ves. 123.
(*m*) *Duke* v. *Sylvester*, 12 Ves. 126.
(*n*) *Bax* v. *Whitbread*, 16 Ves. 15.
(*o*) *Butcher* v. *Butcher*, 9 Ves. 382; 1 V. & B. 79.
(*p*) *Alexander* v. *Alexander*, 1 Ves. Sr. 640.
(*q*) *Bax* v. *Whitbread*, 16 Ves. 15, 19, 21; *Boyle* v. *Bishop of Peterborough*, 1 Ves. J. 299, 310.
(*r*) *Maddison* v. *Andrew*, 1 Ves. Sr. 57. 59.
(*s*) *Burrell* v. *Burrell*, 1 Amb. 660.
(*t*) *Long* v. *Long*, 5 Ves. 445, 448.
(*u*) *Per* LORD REDESDALE, *Lysaght* v. *Royse*, 3 Sch. & L. 155; and see *Vanderzee* v. *Aclom*, 4 Ves. 771, 785.
(*x*) *Morgan* v. *Surman*, 1 Taunt. 289.
(*y*) 11 Geo. 4 & 1 Will. 4, c. 46.
(*z*) *Minchin* v. *Minchin*, 3 I. Ch. R. 167, 177.
(*a*) L. R. 6 Ch. 162.
(*b*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 409; 3 Not. 1145.

1 Will. 4, c. 46, § 1. one object of a power and of lands of great value to another has been held good (*c*).

Cases since 1830. And where a person having a non-exclusive power to appoint among a class of five persons, bequeathed to two of them a legacy of 5*l.* each, and to the other three all the rest and residue of her property, and over which she had a power of appointment, it was held that the legacies of 5*l.* were charged upon the property subject to the power, as well as on the appointor's own estate, and that the appointment was good (*d*).

But an appointment of the income of a fund to the children successively for life was held not a good exercise of a power to appoint to all and every the children of A. A share of the capital ought to have been given to each (*e*). And *semble* that the appointment of a contingent interest is not sufficient (*f*). And where some of the objects of a non-exclusive power were omitted, the whole appointment was held bad (*g*).

The principles laid down in the above cases govern all powers of appointment exercised between the 16th of July, 1830, and the 30th of July, 1874. Those exercised after the latter date are governed by 37 & 38 Vict. c. 37, the title and preamble of which are as follows :—

An Act to alter and amend the Law as to Appointments under powers not exclusive.

37 & 38 Vict. c. 37. Preamble. WHEREAS by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power who cannot be excluded.[1]

Invalidity of appointments. And whereas instruments intended to operate as executions of such powers are frequently invalid in consequence

(*c*) *Re Stone's Estate*, I. R. 8 Eq. 62

(*d*) *Gainsford* v. *Dunn*, L. R. 17 Eq. 405 ; 3 Not. 1145.

(*e*) *Lloyd* v. *Laver*, 14 Sim. 645.

(*f*) *Minchin* v. *Minchin*, 3 Ir. Ch. R. 167—177 ; and compare *Alexander* v. *Alexander*, 1 Ves. Sr. 640.

(*g*) *Bulteel* v. *Plummer*, L. R. 6 Ch. 160 ; 2 Not. 2160, 3382.

of the donee of the power appointing in favour of some one or more of the objects of the power to the exclusion of the other or others, or some other or others of such objects,[2] and it is expedient to amend the law so as to prevent such intended appointments failing : 37 & 38 Vict. c. 37, Preamble. Appointments under non-exclusive powers.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

[1] See note 6 to 1 Will. 4, c. 46, s. 1 (*h*).

[2] It frequently happened that an appointor omitted, by mistake or otherwise, to appoint a nominal sum to such of the objects of the power as he did not wish to benefit, and the whole appointment consequently failed. This led to the passing of the Act of 1874 (*i*), sect. 1 of which is as follows :—

LAW SINCE 1874.

1. That no appointment, which, from and after the passing of this Act, shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power.[1] 37 & 38 Vict. c. 37, § 1. Appointments to be valid notwithstanding one or more objects excluded.

[1] The practical effect of the above enactment is to render all powers of appointment exercised after the 30th of July, 1874, exclusive, unless the instrument creating the power contains an express declaration to the contrary. See sect. 2 of 1 Will. 4, c. 46, and sect. 2 of 37 & 38 Vict. c. 37, which are as follows :— Effect of the Act of 1874.

ACTS MAY BE EXCLUDED.

2. Provided always, and be it further enacted, that nothing in this Act contained shall prejudice or affect any 1 Will. 4, c. 46, § 2.

(*h*) *Ante*, p. 105. (*i*) 37 & 38 Vict. c. 37.

1 Will. 4, c. 46, § 2. provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded.[1]

[1] See note to sect. 2 of 37 & 38 Vict. c. 37, which is as follows:—

37 & 38 Vict. c. 37, § 2. **2.** Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.[1]

Not to affect any power which declares the amount of the share.

[1] The following remark of LORD ST. LEONARDS applies to powers under the Act of 1874, as well as under the Act of 1830.

"Where it is intended that a party shall have power to divide the fund amongst several objects in *substantial* proportions, according to his discretion, but shall not be at liberty to give a merely nominal share to any, the smallest sum which the person creating the power would wish each of the objects, in any event, to have, should be named; and it should be declared that the donee of the power shall not be at liberty to appoint any less sum to any of the objects (*l*)."

1 Will. 4, c. 46, § 3. **3.** Provided also, and be it further enacted and declared, that nothing in this Act contained shall be construed, deemed, or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.

Not to validate powers otherwise bad.

(*l*) Sugd. Pow. 14th ed. 450—1.

VENDOR AND PURCHASER ACT 1874.

37 & 38 VICT. c. 78.

An Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land.

WHEREAS, it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser:

37 & 38 Vict. c. 78. Preamble.

Be it enacted, &c.

ROOT OF TITLE—FORTY YEARS.

1. In the completion of any contract of sale[1] of land[2] made after the thirty-first day of December, one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract,[3] forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement;[4] nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.[5]

37 & 38 Vict. c. 78, § 1. Forty years substituted for sixty years as root of title.

[1] The Act, in terms, applies only to a sale, and not to a mortgage. The rights of a mortgagee are, therefore, unaffected by this section, and the rules under sect. 2. Contract for sale.

[2] Nor does the Act appear to apply to incorporeal hereditaments. The definition of the word "land" in sect. 1 of the principal Statute of Limitation (*a*), may be usefully referred to. The Vendor and Purchaser Act contains no definition. See also 13 & 14 Vict. c. 21, s. 4. Meaning of "land."

(*a*) 3 & 4 Will. 4, c. 27, p. 6, *ante*.

37 & 38 Vict. c. 78, § 1.

[3] In many cases, circumstances exist which render a stipulation that the title shall commence with a document less than forty years old, not only advisable, but necessary. In practice an abstract is often limited to twenty or thirty years, and this is constantly accepted as a fair holding title.

Reason for length of abstract.

[4] Eminent authorities have differed as to whether the time for which a title is required to be shown depends upon the time which confers a title under the Statutes of Limitation, or upon the average duration of human life. See note 2 to sect. 5 of the Real Property Limitation Act, 1874 (*b*). It may safely be affirmed that after that Act comes into operation, there will be a disposition to purchase with still shorter titles than are now usually accepted. See *Bolton* v. *London School Board*, p. 113, *infra*.

When longer than forty years' title may be required.

[5] The title to an advowson must be carried back for 100 years (*c*), or for sixty years with three presentations (*d*).

"Upon the sale of a reversionary interest, whatever may be its antiquity, the abstract should go back sufficiently far to show its creation" (*e*).

Upon a sale of leaseholds the vendor must produce the original lease, or account for its absence and prove its contents, although it may be more than sixty [or now forty] years old (*f*).

A similar rule applies to property held under a grant from the crown (*g*). With regard to tithes and other incorporeal hereditaments, a question may arise whether, in addition to the production of the original grant, the title must be regularly deduced for forty or sixty years prior to the day of sale.

Upon ordinary sales of land the prior title must, in some cases, be produced to explain matters arising upon the abstract. "In every case where the statement in the abstract, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced" (*h*).

RIGHTS UNDER OPEN CONTRACT.

37 & 38 Vict. c. 78, § 2.

2. In the completion of any such contract as aforesaid,[1] and subject to any stipulation to the contrary in the con-

(*b*) 37 & 38 Vict. c. 57, p. 44, *ante*.
(*c*) Dart, V. & P. (5th ed.), 293.
(*d*) 1 Dav. (4th ed.), 527. See also 3 & 4 Will. 4, c. 27, s. 30, p. 75, *ante*.
(*e*) Dart, V. & P. (5th ed.) 294.
(*f*) *Frend* v. *Buckley*, L. R. 5 Q. B. 213, 217, 218; 2 Not. 2539.
(*g*) Dart. V. & P. (5th ed.) 295.
(*h*) Sugd. V. & P. (14th ed.) 366.

tract,[2] the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

37 & 38 Vict. c. 78. § 2.

Rights under open contract.

Rule I. Lessor's title.

First. Under a contract to grant or assign a term of years,[3] whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled[4] to call for[5] the title to the freehold.[6]

Rule II. Recitals evidence.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament,[10] or statutory declarations, twenty years old at the date of the contract,[7] shall, unless and except so far as they shall be proved to be inaccurate,[8] be taken to be sufficient[9] evidence of the truth of such facts, matters, and descriptions.

Rule III. Covenants for production.

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.[11]

Rule IV. Expense of covenants for production.

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense;[12] and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

Rule V Title deeds.

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.[13]

[1] "Any contract of sale of land" made after 31st December, 1874 (*i*).

[2] Provisions similar to those embodied in the rules under this section are usually inserted as conditions of sale, or as stipulations in contracts for the sale, of real estate. In some cases the stipula-

(*i*) Sect. 1, p. 109, *ante*.

37 & 38 Vict. c. 78, § 2.

tions in general use are more favourable to the vendor than the rules, and will probably continue to be used, notwithstanding this enactment. In other cases, which are pointed out below, the stipulations hitherto used may be safely omitted, in reliance upon these rules.

Rule I. Production of lessor's title.

[3] This rule is limited to a "term of years," and does not appear to apply to leaseholds for lives.

[4] "A person who agrees to let land agrees to grant a *valid* lease, as a person who agrees to sell land agrees to execute a *valid* conveyance of it." *Per* WILLES, J. (*k*). Therefore, in the absence of express stipulation, an intended lessee was entitled to satisfy himself by investigation of his lessor's title, that the lessor had power to grant such a lease as had been agreed upon. And the same rule applied to a sale of leaseholds except where the lease had been granted by a bishop (*l*), or, perhaps, by a dean and chapter. In the case of lessor and lessee there was usually no inconvenience in this rule; but upon a *sale* of leaseholds the vendor is frequently unable to produce his lessor's title, and it therefore became necessary to negative the purchaser's right to such production.

[5] Upon a sale of leaseholds the condition in general use provides that "the purchaser shall not call for the production of, or investigate, or make any objection or requisition in respect of the title of the lessor, *or the right to grant the lease;*" and the writer has, in some cases, substituted the clause:—"or any title prior to or other than the said lease; and such lease shall be deemed valid and well granted," for the words in italics. It will be noticed that these conditions are much more comprehensive than the provision of the new enactment; and it is an open question whether the latter would preclude a purchaser of leaseholds from inquiring into the lessor's title and insisting upon an answer to any requisition which would not necessitate its actual production. One of the most eminent of living conveyancers has expressed an opinion that it would not (*m*). It may be observed that a condition that "the lessor's title will not be shown, *and shall not be inquired into*" has been held to mean that the title should be accepted without objection or inquiry, and to preclude the purchaser from raising an objection disclosed by Acts of Parliament (*n*). On the other hand, a condition that "no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease" was held not to preclude the purchaser from objecting that, upon the face of

(*k*) *Stranks* v. *St. John*, L. R. 2 C. P. 376—380; 1 Not. 6097.
(*l*) *Fane* v. *Spencer*, 2 Mer. 430.
(*m*) Dart, V. & P. (5th ed.) 168.
(*n*) *Hume* v. *Bentley*, 5 De G. & S. 520.

the abstract, it appeared from recitals that the lessor had no power to grant the lease (*o*). In the one case the examination of the Acts of Parliament involved an inquiry; in the other the defect was patent, without any inquiry. 37 & 38 Vict. c. 78, § 2.

[6] It is only the title "to the freehold" that is protected by the new rule. Therefore, under all open contracts to grant or assign an *underlease* the right of the immediate lessor to grant such underlease must still be established by the production of his title.

[7] The usual condition as to recitals is that "every deed or document dated more than twenty years ago shall be *conclusive* evidence of everything recited, stated, noticed, *assumed or implied* therein" (*p*). The new rule does not in terms extend to matters "assumed or implied," and will probably be held to apply only to direct statements by recital or otherwise (*q*). Where an abstract commenced with a deed more than twenty years old containing a recital that the vendor was seised in fee, it was held that no earlier title need be shewn (*r*). Rule II. Recitals to be evidence.

It is doubtful whether the ordinary condition extends to conclusions of law, and the same doubt applies equally to the rule under discussion. It is often advisable to extend the ordinary condition specifically to "facts, matters, and conclusions of law" instead of relying upon the general expression "everything."

[8] It is also doubtful whether (in the absence of any misrepresentation in the condition) the ordinary condition precludes the purchaser from proving the inaccuracy of the recitals or statements to which it refers *aliunde* (*s*).

[9] If it were limited to "sufficient" instead of "conclusive" evidence the better opinion is that it would not, but the writer is not aware of any express decision upon the point.

On the whole the new enactment may fairly be relied upon where it is merely desired to make recitals evidence of *facts:* but if it is necessary to include matters assumed or implied, or conclusions of law, an express condition will still be necessary. In practice it is occasionally convenient to fix a shorter limit than twenty years; and such a stipulation is seldom, if ever, found to prejudice a sale. The condition is sometimes extended to the "material contents and due execution" of recited documents of which the vendor has no copies, and cannot obtain production.

[10] Recitals in recent private Acts were not evidence before this

(*o*) *Waddell* v. *Wolfe*, L. R. 9 Q. B. 21; 3 Not. 1378.
(*p*) 1 Dav. Conv., 4th ed., 609.
(*q*) See *Buchanan* v. *Poppleton*, 4 C. B. N. S. 20; *Gould* v. *White*, K. 683—687.
(*r*) *Bolton* v. *London School Board*, 7 Ch. D. 766.
(*s*) *Drysdale* v. *Mace*, 5 D. M. G. 103—107.

37 & 38. Vict. c. 78, § 2.

enactment (*t*), nor were recitals in public Acts conclusive evidence (*u*).

Rule III. Covenants for production of deeds.

[11] Hitherto, where the deeds were not handed over no purchaser was compelled to complete without a legal covenant for their production, even though he would have an equitable right to compel production (*v*).

"A legal covenant is, of course, a covenant so framed as to run with the land at law; but it is by no means clear what is meant by *an equitable right to production*, or how such a right can be enforced, except, perhaps, against a holder of the deeds who took them with notice of the liability to produce them" (*x*).

The subject of equitable right to production is treated of by Mr. Copinger in the third chapter of his work on "Title Deeds" (*y*), and by Mr. Dart in the ninth chapter of his work on "Vendors and Purchasers" (*z*). Mr. Davidson remarks that "the framer of the Act thought it better to have the meaning of the words *equitable right to production* to be settled, if necessary, judicially, rather than to attempt to define it" (*a*). It has not yet been so settled.

It has been usual to guard against this right, where necessary, by some such condition as the following:—"The purchaser shall not. . . . . make any objection on the ground of any existing covenant for the production of muniments of title being invalid or insufficient, or not running with the land or otherwise, nor require any other covenant for the production of any such muniments, nor make any objection on account of the absence thereof, but shall be satisfied in all respects with such existing covenant" (*b*). A shorter and equally effectual condition, for which the writer is indebted to Mr. Dart, is in the following words:—"No objection or requisition shall be made on the ground of the absence or imperfection of any covenants. . . . . for the production of muniments of title."

Where it is clear that the purchaser will have an equitable right to production, the statutory provision may be safely relied upon; but until the words "equitable right" have received a judicial interpretation it will be more prudent, in most cases, to insert a short condition in the usual way.

Rule IV. Expense of covenants for production.

[12] Before this enactment a purchaser under an open contract was entitled to be furnished, at the vendor's expense, with attested copies (*c*), and covenants for the production of the originals (*d*) of all

(*t*) *Cowell* v. *Chambers*, 21 B. 619; *Shrewsbury Peerage Case*, 7 H. L. C. 1—13.
(*u*) *Rex* v. *Greene*, 6 A. & E. 548, 555.
(*v*) *Barclay* v. *Raine*, 1 Sim. & Stu. 449.
(*x*) Dart V. & P., 5th ed., 143.
(*y*) Pp. 50, 70.
(*z*) Pp. 409—414, 5th ed.
(*a*) 2 Dav. Conv. (Part 1), 4th ed., 6.
(*b*) 1 Dav. Conv., 4th ed., 610.
(*c*) *Dare* v. *Tucker*, 6 Ves. 460.
(*d*) *Cooper* v. *Emery*, 1 Phil. 388.

such deeds as were not handed over to him, and were necessary to make out a marketable title (*e*). The usual form of condition is given in the next note. It will be observed that the new rule leaves the right to attested copies untouched; and it will, therefore, still be necessary to provide against it where the deeds are not handed over to the purchaser. The following condition is often used for this purpose:—"The expense of the production, inspection, and examination, and of making and furnishing abstracts of all deeds, documents, evidences, and muniments of title (if any) not in the vendor's possession, and of obtaining, making, and producing all office, attested, and other copies of, or extracts from, records, registers, deeds, wills, probates, letters of administration, and other documents, whether in the vendor's possession or not, and of obtaining, making, and producing all declarations, certificates, and other evidence whatever, not in the vendor's possession, and of obtaining any information not in the vendor's knowledge, whether such production inspection, examination, copies, extracts, declarations, certificates, or other evidence or information shall be required for the completion or verification of the title or abstract, or for any other purpose, shall be borne by the purchaser" (*f*). 37 & 38 Vict c. 78, § 2.

Sometimes it is provided that no objection or requisition shall be made in respect of the non-production of the original or an attested copy of any instrument recited in abstracted documents of a specified age; and that if the purchaser shall require any office, attested, or other copy of or extract from any document [so recited], whether in the vendor's possession or not, and whether for the purpose of verifying the abstract or of accompanying or completing the title, or otherwise, the expense of complying with every such requisition shall be borne by the purchaser.

Rule V. Custody of title deeds.

[13] Formerly, under an open contract, the vendor was entitled to retain the deeds on covenanting to produce them, if the property he retained was of greater value than any of the lots he sold. Mr. Dart (*g*) was of opinion that he might retain them if he retained any portion of the property, irrespective of the question of value; while Lord St. Leonards (*h*) considered that the holder of the portion of highest value was entitled to them, whether vendor or purchaser.

In practice it has been usual to stipulate in the following terms:—"The vendor will retain such muniments of title as relate to other property not included in the sale, and will enter into usual covenants with the purchaser for the production and furnishing copies thereof,

(*e*) See Dart V. & P., 5th ed., 676—7; Cop. Tit. Deeds, 120; and 1 Dav. Conv., 4th ed., 590.

(*f*) 1 Dav. Conv., 4th ed., 609.

(*g*) V. & P., 4th ed., 618, 5th ed., 674.

(*h*) Sug. V. & P., 14th ed., 434.

37 & 38 Vict. c. 78, § 2.

such covenants to be prepared by and at the expense of the purchaser; and to be expressed to be binding on the vendor and his representatives, and to render him and them responsible only while retaining the custody of the muniments, but to be binding on the muniments into whosesoever hands the same may come."

The first portion of this condition may now be safely omitted in reliance upon Rules 4 and 5; the latter portion or some modification of it should still be inserted—at any rate in the case of fiduciary vendors.

37 & 38 Vict. c. 78, § 3.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.

Rules to apply to sale or purchase by trustees.

LEGAL ESTATE.—MORTGAGEE OR TRUSTEE.

37 & 38 Vict. c. 78, § 4.

4. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage,[1] convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

Legal personal representative of mortgagee may convey on payment of sums secured.

[1] It has been held that this section is confined to the case of payment off and reconveyance, and does not apply to a transfer, even though the consideration may amount to "all sums secured by the mortgage" (*i*). In such a case, if the mortgagee has died intestate as to trust and mortgage estates, leaving an infant heir, a vesting order is still necessary. This decision certainly puts a narrow construction on the word "payment," and it would seem to follow that the section does not apply to a "payment" by exercising a power of sale, even though the purchase-money may equal or exceed the amount due on the mortgage (*k*). And, of course, it cannot apply to any case where the mortgagee receives less than the total amount of "all sums secured by the mortgage."

Sect. 4 applies only to repayment and reconveyance.

37 & 38 Vict. c. 78, § 5.

5. *Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised* [1]

(*i*) *Re Brook's Mortgage*, 25 W. R. 841; 4 Not. 1317.

(*k*) Compare Dart V. & P., 5th ed., 16.

in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

37 & 38 Vict. c. 78, § 5.

This section is repealed and re-enacted, with alterations, by sect. 48 of the Land Transfer Act, 1875 (*l*), which is as follows :—

48. Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act;[1] and, instead thereof, be it enacted, that upon the death of a bare trustee[2] intestate as to[3] any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of "The Vendor and Purchaser Act, 1874," shall not apply to lands registered under this Act.

38 & 39 Vict. c. 87, § 48.

Estate of deceased intestate trustee to vest in his legal personal representative.

[1] Where a bare trustee died intestate between the passing and repeal of sect. 5, and no act had been done to get in the legal estate, on the assumption that it was vested in his legal personal representative before such repeal, it was held that the legal estate vested in his heir (*m*).

"Duly done thereunder."

[2] A bare trustee is a trustee whose trust is to convey, and who would be compelled by a court of equity to do so on the application of his *cestui que trust* (*n*). Therefore this section does not apply to the case of a mortgagee dying intestate, which is provided for by sect. 4, *ante*, p. 116.

Who is a "bare trustee."

[3] The words "intestate as to" were introduced because doubts had been expressed whether the original enactment rendered a devise of trust estates inoperative.

6. When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*.

37 & 38 Vict. c. 78, § 6.

Married

(*l*) 38 & 39 Vict. c. 87.
(*m*) *Christie* v. *Ovington*, 1 Ch. D. 279; 4 Not. 249.
(*n*) *Ibid.*

37 & 38 Vict. c. 78, § 7.

woman who is bare trustee may convey as if *feme sole*.

Tacking abolished as regards transactions between Aug. 7, 1874, and Jan. 1, 1876.

7. *After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

This section is now repealed by sect. 129 of the Land Transfer Act, 1875 (*o*), which is as follows:—

38 & 39 Vict. c. 87, § 129.

Repeal of 37 & 38 Vict. c. 78, s. 7.

129. The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act.[1]

[1] See the first note to sect. 48 of the Land Transfer Act (*p*).

37 & 38 Vict. c. 78, § 8.

Non-registration of wills in Middlesex or Yorkshire.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf,[1] an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

[1] Within six months of the testator's death; or within three years if he died upon or beyond the seas (*q*). In Middlesex, if a will is contested, the time is two years; if it is concealed or suppressed, five years; and if there is any other inevitable obstacle to registration, four years (*r*). In Yorkshire, the time, in case of contest or other inevitable difficulty, is extended to six months after the removal of the difficulty (*s*).

(*o*) 38 & 39 Vict. c. 87.
(*p*) P. 117, *ante*.
(*q*) 7 Anne, c. 20, s. 8; 2 & 3 Anne, c. 4, s. 21; 6 Anne, c. 62 (c. 35 in Ruffhead), s. 14; 8 Geo. 2, c. 6, s. 15.
(*r*) 7 Anne, c. 20, ss. 9, 10.
(*s*) 2 & 3 Anne, c. 4, s. 22; 6 Anne, c. 62 (c. 35 in Ruffhead), s. 15; 8 Geo. 2, c. 6, s. 16.

APPLICATIONS IN CHAMBERS.

37 & 38 Vict. c. 78, § 9.

Vendors and purchasers may apply to judge in chambers to decide questions.

9. A vendor or purchaser[1] of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery[2] in England in chambers,[3] in respect of any requisitions or objections, or any claim for compensation, or any other question[4] arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.[5]

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery[6] in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Sect. 9 applies only to sales.

[1] This section, in terms, only applies to questions between vendor and purchaser. Such a provision with regard to questions between a mortgagor and mortgagee is unnecessary, for a proposed mortgagee, who was dissatisfied with the mortgagor's title, would simply decline to advance his money on the proposed security. Where questions arose upon a *gift* of land for the site of a church, under 36 & 37 Vict. c. 50, s. 1, it was doubted whether this section applied, and the difficulty was got over by making the transaction a sale for a nominal consideration (*t*). Whether or not it applies to questions between lessor and lessee has not, so far as the writer is aware, been decided. A lessee who pays a premium might fairly be considered a "purchaser of . . . . leasehold estate;" and it is observable that while sect. 1 speaks of "any contract for sale of land," the first

(*t*) *Re Marquis of Salisbury*, 23 W. R. 824; 3 Not. 2748.

37 & 38 Vict. c. 78, § 9.

rule of sect. 2, which applies to "any such contract as aforesaid," expressly mentions, "a contract to grant" as well as to assign "a term of years." In contracts between lessor and lessee, questions often arise as to the covenants, &c., to be inserted in the lease, which could be much more cheaply and expeditiously settled under this section (assuming it to apply) than by an action for specific performance.

[2] Now the Chancery Division of the High Court of Justice (*u*).

Summons may be adjourned into Court.

[3] The Act compels a judge to hear questions argued in chambers (*x*), but if he wishes to hear further argument he may adjourn the summons into Court (*y*). In cases where the decision is in favour of the title, judgment will be delivered in Court, if the purchaser desires it in order to strengthen his title (*z*).

Applies to questions of fact as well as law.

[4] It was at one time thought that questions of law or construction only, and not disputed questions of fact, could be decided upon a summary application under this section (*a*). But it has now been decided by the Court of Appeal that "whatever could be done in chambers, upon a reference as to title under a decree where the contract was established," in an action for specific performance, can be done upon a summons under this section (*b*).

The following are some of the questions which have already been decided under this beneficial enactment:—

Questions decided under this section.

Whether under general devises by a mortgagee (*c*) and trustee (*d*), the legal estate in mortgaged and trust property respectively passed. Whether a power of sale authorizes a partition (*e*). Who were the particular persons entitled under a devise to a class (*f*). Whether the rule in Shelley's case applies to wills as well as to deeds (*g*). Whether an attempted limitation was void for remoteness (*h*). Whether a post nuptial settlement was void, as against a subsequent mortgagee without notice (*i*). What succession duty was payable, and upon what events (*j*). Whether a father is a guardian capable

(*u*) 36 & 37 Vict. c. 66, s. 34 (2).

(*x*) *Re Coleman & Jarrom*, 4 Ch. D. 165—168; 4 Not. 361.

(*y*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802; 4 Not. 598; *Re Brown & Sibly*, 3 Ch. D. 156; 4 Not. 112, 114; *Re Popple & Barratt*, 25 W. R. 248.

(*z*) *Re Coleman & Jarrom*, 4 Ch. D. 165, 168; 4 Not. 361.

(*a*) *Re Popple & Barratt*, 25 W. R. 248.

(*b*) *Re Burroughs, Lynn & Sexton*, 5 Ch. D. 601; 4 Not. 983.

(*c*) *Re Packman & Moss*, 1 Ch. D. 214; 3 Not. 2613.

(*d*) *Re Brown & Sibly*, 3 Ch. D. 156; 4 Not. 144.

(*e*) *Re Frith & Osborne*, 3 Ch. D. 618; 4 Not. 114.

(*f*) *Re Coleman & Jarrom*, 4 Ch. D. 165; 4 Not. 361.

(*g*) *White & Hindle's Contract*, 7 Ch. D. 201.

(*h*) *Re Brown & Sibly*, 3 Ch. D. 156; 4 Not. 112.

(*i*) *Re Foster & Lister*, 25 W. R. 553; 4 Not. 1051.

(*j*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802; 4 Not. 598.

37 & 38 Vict. c. 78, § 9.

of consenting to a gift of an infant's land for the site of a church under 36 & 37 Vict. c. 50, s. 1 (*k*). Whether a married woman who has obtained a protection order can give a valid receipt for a legacy without her husband's concurrence (*l*). Whether a mortgagee of a life estate and reversion under separate instruments containing the usual powers, can sell the fee simple in possession under his separate powers of sale, the purchase-money being apportioned (*m*). Whether two surviving trustees had power to sell without the concurrence of the beneficiaries, where powers of sale and management had been given to them jointly with a deceased trustee who was also tenant for life (*n*). Whether the survivor of two trustees in bankruptcy could convey alone (*o*). Whether the survivor of two joint official liquidators could affix the seal of the company to an instrument which merely carried out an agreement entered into by himself and his colleague for the sale of part of the assets of the company (*p*). Whether the vendor had shown a title to the soil or only to rights of pasturage (*q*). Whether, upon a purchase at £100 per acre, part of a drain which bounded the property and which was included in the conveyance was to be taken into account in calculating the purchase-money (*r*). Whether the purchaser can insist upon an answer from the vendor and his solicitor to the usual requisition as to the existence of incumbrances and objections to title (*s*). Whether a vendor who knowingly sells with a defective title can take advantage of the usual condition, giving him power to rescind if the purchaser insists upon any objection or requisition which he declines to remove or comply with (*t*). Whether a purchaser from a compounding debtor can require evidence that the several instalments of the composition are paid or secured (*u*).

Costs.

Where the vendor took out a summons and was successful; but the question was one which a purchaser might fairly raise; no order was made as to costs (*x*). In most cases, however, the costs have followed the event, whether the summons has been taken out by the

(*k*) *Re Marquis of Salisbury*, L. R. 20 Eq. 527; 2 Ch. D. 29; 3 Not. 2748.

(*l*) *Re Coward & Adam*, L. R. 20 Eq. 179; 3 Not. 2445.

(*m*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802; 4 Not. 598.

(*n*) *Re Cooke's Contract*, 4 Ch. D. 454; 4 Not. 507.

(*o*) *Re Waddell's Contract*, 2 Ch. D. 192; 3 Not. 2794.

(*p*) *Re Metropolitan Bank & Jones*, 2 Ch. D. 366; 3 Not. 2589.

(*q*) *Re Burroughs, Lynn & Sexton*, 5 Ch. D. 601; 4 Not. 983.

(*r*) *Re Popple & Barratt*, 25 W. R. 248.

(*s*) *Re Solomon & Davey*, 19 Sol. J. 715—846.

(*t*) *Re Phillips & Penfold*, 19 Sol. J. 301.

(*u*) *Re Kearley & Clayton's Contract*, 7 Ch. D. 615.

(*x*) *Re Coward & Adam*, L. R. 20 Eq. 179; 3 Not. 2445; *Re Kearley & Clayton's Contract*, 7 Ch. D. 615.

37 & 38 Vict. c. 78, §§ 9,10.

vendor or purchaser (*y*). But where a purchaser's summons was successful upon one point, and failed upon another, the vendor was ordered to pay his costs (*z*). And in one case, as reported, it appears that vendors who took out a summons and were successful upon both points, were ordered to pay costs (*a*). The questions raised in this case were, however, of considerable importance and some difficulty, and gave rise to a long and elaborate judgment.

[6] Now the High Court of Justice in Ireland (*b*).

Extent and short title of Act.

10. This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

(*y*) *Re Packman & Moss*, 1 Ch. D. 214; 3 Not. 2613; *Re Waddell's Contract*, 2 Ch. D. 172; 3 Not. 2794; *Re Cooke's Contract*, 4 Ch. D. 454; 4 Not. 507; *Re Burroughs, Lynn & Sexton*, 5 Ch. D. 601; 4 Not. 983; *Re Popple & Barratt*, 25 W. R. 248; *Re Phillips & Penfold*, 19 Sol. J. 301.

(*z*) *Re Solomon & Davey*, 19 Sol. J. 715.

(*a*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802; 4 Not. 598.

(*b*) 40 & 41 Vict. c. 57, ss. 4, 5, 21, 36.

PARTITION ACTS, 1868 & 1876.

31 & 32 Vict. c. 40.
39 & 40 Vict. c. 17.

An Act to amend the law relating to partition.

31 & 32 Vict. c. 40, § 1.

Be it enacted, &c.

1. This Act may be cited as the Partition Act, 1868.

Title of Act of 1868.

An Act to amend the Partition Act, 1868.

39 & 40 Vict. c. 17, § 1.

Be it enacted, &c.

1. This Act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868.

39 & 40 Vict. c. 17, § 2.

2. This Act shall apply to actions pending at the time of the passing of this Act[1] as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes a decree or order.

Applies to pending actions.

[1] The Act of 1868 was held to be so far retrospective as to authorise a sale in suit already commenced (*a*), if a decree for partition had not been made (*b*).

31 & 32 Vict. c. 40, § 2.

2. In this Act the term "the Court" means the Court of Chancery in England,[1] the Court of Chancery in Ireland,[2] the Landed Estates Court in Ireland,[2] and the Court of Chancery of the County Palatine of Lancaster, within their respective jurisdictions.

Meaning of "the Court."

[1] By sect. 16 of the Judicature Act, 1873 (*c*), the jurisdiction previously exercised by the High Court of Chancery in England was transferred to and vested in the High Court of Justice; and by sect. 34 all causes or matters for the partition of real estates were assigned to the Chancery Division.

[2] Similar provisions with regard to Ireland are made by sections 21 and 36 of the Judicature Act (Ireland), 1877 (*d*).

(*a*) *Lys* v. *Lys*, L. R. 7 Eq. 126; 2 Not. 1828.

(*b*) *Pryor* v. *Pryor*, L. R. 19 Eq. 595, L. R. 10 Ch. 469; 3 Not. 1940.

(*c*) 36 & 37 Vict. c. 66.

(*d*) 40 & 41 Vict. c. 57.

COURT MAY ORDER SALE WHERE BENEFICIAL.

31 & 32 Vict. c. 40, § 3.

Court may order sale where beneficial.

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court[1] that, by reason of the nature of the property[2] to which the suit relates, or of the number of the parties interested[3] or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance,[4] a sale of the property and a distribution of the proceeds would be more beneficial[5] for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request[6] of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.[7]

Effect of sect. 3.

[1] "The 3rd section gives power for the Court to sell for certain reasons . . . . It is an absolute power of sale on the request of anybody, provided the Court is satisfied that it would be more beneficial for the parties interested than a division." *Per* JESSEL, M. R. (*e*).

"The Court is at liberty at the request of a person holding one-tenth, and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property or from the number of the persons interested the Court thinks it right and reasonable to do so." *Per* LORD HATHERLEY, C. (*f*).

Where a sale was opposed by the majority, WICKENS, V.-C., held that the *onus* was on the minority to show that a sale would be beneficial. "In order to do this," he continued, "they must shew that the majority were perverse, or had mistaken their interest in wishing for a partition, and if that could not be done—and they had not done so—the Court ought not to order a sale against the wish of the majority" (*g*).

(*e*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—531 ; 3 Not. 2318.

(*f*) *Pemberton* v. *Barnes*, L. R. 6 Ch. 685—694 ; 2 Not. 3732.

(*g*) *Allen* v. *Allen*, 21 W. R. 842.

[2] An order has been made for partition of part of an estate, and sale of the rest; in one case it appears to have been by consent (*h*); but in other cases the Court was guided by the nature of the property. In one case the property consisted of several distinct estates—some being large and others small—in which more than sixty persons were interested (*i*); and in another case the property consisted of several houses, and a sale was opposed by the majority of persons interested (*j*). 31 & 32 Vict. c. 40, **§ 3.** Nature of the property.

[3] Where property was divisible in thirteenths among four persons resident in England and nine resident in Australia (some being under disability) the Court ordered a sale (*k*). Number of persons interested.

And property in which infants were interested was ordered to be sold, although their testator had directed that no sale should take place during their minorities. In this case the property had been used for the purposes of a business, which had been removed elsewhere; and there was no probability of obtaining a good rent on a short lease (*l*).

Where nine persons were entitled in thirty-sixth shares to property consisting of a farmhouse with twenty-five acres of freehold and five acres of copyhold land, it was held to be a proper case for a sale, both on account of the nature of the property and the number of the parties interested (*m*).

[4] See notes to sect. 5, *infra*.

[5] "What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment, I must look to the monetary results." *Per* JESSEL, M. R. (*n*). Meaning of "beneficial."

[6] As to who may "request" a sale, see sect. 6 of the Act of 1876, and notes thereto (*o*).

[7] As to proceedings at the hearing and the directions then given, see sect. 9 of the Act of 1868, and notes thereto (*p*).

OWNERS OF MOIETY—RIGHT TO A SALE.

4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or col- 31 & 32 Vict. c. 40, **§ 4.** Owners of

(*h*) *Roebuck* v. *Chadebert*, L. R. 8 Eq. 127; 2 Not. 1966.
(*i*) *Pennington* v. *Dalbiac*, 18 W. R. 684.
(*j*) *Allen* v. *Allen*, 21 W. R. 842.
(*k*) *Acton* v. *Meredith*, L. R. 11 Eq. 602; 2 Not. 3466.
(*l*) *Thompson* v. *Richardson*, I. R. 6 Eq. 596—598.
(*m*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—532—3.
(*n*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—533; 3 Not. 2318.
(*o*) P. 130, *infra*.
(*p*) P. 136, *infra*.

31 & 32 Vict. c. 40, § 4.

a moiety may require a sale in the absence of good reason to the contrary.

lectively, to the extent of one moiety[1] or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary,[2] direct a sale of the property accordingly, and give all necessary or proper consequential directions.

Effect of sect. 4.

[1] "The scope of the enactment appears to me to be this: there being as I have said, reasons which may induce some of the part owners to wish for a partition, and others to wish for a sale and a division of the proceeds, the legislature says that if the votes are equally divided, one half of the persons interested in the property desiring a sale, and the other half a partition, then the half requiring the sale shall have the preponderating voice, and the Court shall be bound to give them a sale, wholly irrespective of the 3rd section. But still there is a certain discretion left to the Court, so that the Court can refuse a sale when it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable. If we then look to the 5th section, we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections." *Per* LORD HATHERLEY, C. (*q*).

See also notes to sect. 5 (*r*).

The Act throws the burden of proof upon the tenant in common who resists sale and claims partition (*s*).

"The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shewn; they have not to shew any reason for the sale, but a reason to the contrary must be shewn." *Per* JESSEL, M. R. (*t*).

What is good reason to the contrary.

[2] The fact that a sale may possibly diminish the income of an infant presumptively entitled to a moiety of the property is not "good reason to the contrary" (*u*).

Nor is the fact that the owner of a moiety is yearly tenant of and carries on business upon the entirety of the property (*v*).

(*q*) *Pemberton* v. *Barnes*, L. R. 6 Ch. 685—693; 2 Not. 3732.

(*r*) P. 128, *infra*.

(*s*) *Pemberton* v. *Barnes*, L. R. 6 Ch. 693; 2 Not. 3732; *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14; 3 Not. 834.

(*t*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—531; 3 Not. 2318.

(*u*) *Rowe* v. *Gray*, 5 Ch. D. 263; 4 Not. 728.

(*v*) *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14; 3 Not. 834.

31 & 32 Vict. c. 40, § 4.

Nor the fact that the property consists of a large landed estate or a mansion house, derived by the plaintiff and defendant from a common ancestor, coupled with the desire of either party to keep his moiety in the family (*x*); even though the property may be almost surrounded by, and have been usually occupied with, other property of which one party is tenant for life; especially if the other party wishes to buy the whole of the property (*y*).

And of course the mere dissent of a minority is not *per se* "good reason to the contrary" though it may largely enter into the consideration of what is such reason (*z*).

PURCHASE OF SHARE IN LIEU OF SALE.

31 & 32 Vict. c. 40, § 5.

Court may order sale unless parties opposing will purchase share of party requesting a sale.

5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests [3] the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit,[1] unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale,[2] direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given [3] the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

Effect of sect. 5.

What the precise effect of this section may be has not yet been authoritatively settled.

Lord Hatherley, C., on appeal from Malins, V.-C., expressed an opinion that it was a limitation of the powers conferred by sects. 3 and 4. On the other hand, Jessel, M. R., in a recent case considered that sect. 5 confers an absolute right to a sale, quite independently of sect. 3, on any part owner, however small his interest,

(*x*) *Pemberton* v. *Barnes*, L. R. 6 Ch. 685—694; 2 Not. 3732.

(*y*) *Porter* v. *Lopes*, 7 Ch. D. 358.

(*z*) *Re Langdale*, I. R. 6 Eq. 572—574.

31 & 32 Vict. c. 40. § 5.

unless the other part owners, or some of them, are able and willing to purchase such interest.

In the present state of the authorities, the following extracts from the judgments in which these opinions were expressed may be profitably compared:—

Opinion of Lord Hatherley.

"If we then look to the 5th section, we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections. Here a wide discretion is given to the Court. The Court may think that a sale under the 3rd or 4th section is rather hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the Court can give them liberty to do so. . . . The case therefore stands thus:— (α) The Court *is at liberty*, at the request of a person holding one tenth and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property or from the number of the persons interested the Court thinks it right to do so. (β) If the Court finds that the parties entitled to a moiety or upwards desire a sale, the Court *must order it*, unless some good reason is shown to the contrary, or *unless the persons objecting* to a sale *offer to purchase* the shares of the parties desiring it, in which case the Court has a discretion to authorize them to do so." *Per* LORD HATHERLEY, C. (*a*).

Opinion of Jessel, M.R.

"Where the Court sees no reason at all, still any party interested may apply, and then there is a limit imposed, and the limit is this: that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, *without any opinion of the Court being expressed*, if other people will buy. That is a check upon the new power, not as it has been supposed to be, a limitation of the 3rd and 4th sections, but it is a new power given to any party, whether plaintiff or defendant, to apply with or without any reason whatever, to the Court for a sale, and *he is entitled ask for it*, unless somebody is going to buy; and then *Williams* v. *Games* says that if he does apply for it, and somebody does offer to buy his share, he may withdraw his request. That is my view of the law, and considering that *Williams* v. *Games* is the last decision, I think I am entitled to express that view as one that ought to guide me in future, unless corrected, notwithstanding observations of Lord Hatherley in the case of *Pemberton* v. *Barnes*, which seems to point to the conclusion that the 5th section was in the nature of a proviso to the following effect:—*Provided always, that no sale shall be directed under the 3rd and 4th sections of this Act*

(*a*) *Pemberton* v. *Barnes*, L. R. 6 Ch. 685–693, 694; 2 Not. 3732.

if any other party interested shall undertake to buy the share of the parties asking for sale. That appears to me contrary to the plain meaning of the words of the 5th section. . . . . Therefore under the 5th section *the parties applying are entitled to a sale.*" *Per* JESSEL, M. R. (*b*). 31 & 32 Vict. c. 40, § 5.

It should be remembered that the case from which the last extract is taken was held to fall within sect. 3, and therefore we have expressions of opinion which practically amount to opposite *dicta*. Or, if the later opinion can be considered an absolute decision of the point, it is inconsistent with the opinion previously expressed in a superior Court; and the question may fairly be considered as still open to discussion. With great deference to the eminent authorities who decided *Pemberton* v. *Barnes* and *Drinkwater* v. *Ratcliffe*, it may be doubted whether the true construction of the section does not lie between the two extreme views expressed in those cases. Observations on the effect of sect. 5.

The wording of the whole section is opposed to the view of Lord Hatherley: the fact that sects. 3, 4, and 5 all commence with the same words, would lead to the inference that each was intended to confer a separate power, and if sect. 5 was merely intended to limit the powers given by the two previous sections, such intention would have been more accurately and clearly expressed by a short negative proviso to the effect of that printed above in italics.

On the other hand, it is difficult to reconcile the view of the Master of the Rolls with the actual words of the section: it should be observed that (*a*) under sect. 3, the Court *may if it thinks fit*, under certain circumstances, (*β*) under sect. 4, the Court *shall*, unless reason to the contrary is shown, and (*γ*) under sect. 5, the Court *may if it thinks fit*, unless certain things are done, direct a sale. To hold that "under sect. 5 the parties applying are *entitled* to a sale" (*c*), unless an offer is made to purchase their shares, in cases "where the Court sees no reason for preferring a sale to a partition" (*d*), is equivalent to saying that the Court shall think a sale fit in all cases where no offer to purchase is made. This would practically have the effect of taking away from the Court all discretion to refuse a sale under sect. 3, for every party who had failed to make out a case under that section would be at liberty to claim a sale, as of right, under sect. 5. It is true that the other parties might intervene with an offer to purchase; but it would depend upon them, and not upon the opinion of the Court, whether, in any case, a sale should be prevented.

(*b*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—531—2, 3 Not. 2318.
(*c*) L. R. 20 Eq. 532.
(*d*) *Ibid.* 531.

31 & 32 Vict. c. 40, § 5.

That the Court was intended to have and exercise a discretion under sects. 3 and 5 is clear from the express words of those sections, and this was recognized by WICKENS, V.-C., in a case (*e*) which is cited in the notes to sect. 3 (*f*), and which has not, it is believed, been either questioned or overruled. It was laid down by that learned judge that unless such a course was shown to be beneficial "the Court ought not to order a sale against the wish of the majority."

Party asking for sale not compelled to sell his share only.

[2] "It is clear that the Act was intended for the benefit of those part owners who want a sale, in which case the other parties interested who object to a sale may be *compelled to buy* the shares or have a sale. But there is nothing to compel a man to *sell* his share." And a plaintiff who does not wish to sell his share under sect. 5, "may, on being put to such terms, withdraw his request for a sale, and have a partition." *Per* JAMES, L. J. (*g*).

This case appears, at first sight, to accord with the view expressed in *Drinkwater* v. *Ratcliffe*, but the precise point as to a right to a sale did not arise on appeal; and the *dictum* that parties who object to a sale *may* be compelled to buy the shares or have a sale must be read with the qualification in the section *if the Court shall think fit.* Compare the cases cited under sect. 3 (*h*), where a sale of part of the property and a partition of the rest, has been ordered.

[3] See sect. 6 of the Act of 1876 and notes thereto.

WHO MAY REQUEST A SALE.

39 & 40 Vict. c. 17, § 6.

6. In an action for partition[1] a request for sale[2] may be made or an undertaking to purchase[3] given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

Persons under disability may request a sale, or undertake to purchase.

(*e*) *Allen* v. *Allen*, 21 W. R. 842.
(*f*) *Ante*, p. 124.
(*g*) *Williams* v. *Games*, L. R. 10 Ch. 204—5, 3 Not. 1839.
(*h*) *Ante*, p. 125.

39 & 40 Vict. c. 17, § 6.

[1] This section clears up doubts which arose under sects. 3, 4, and 5, of the principal Act.

[2] It had previously been held that a request for a sale might be made by an infant (*i*), and by a *feme coverte* (*k*) (who must, however, be separately examined as to her consent) (*l*), but not by a person of unsound mind by his or her next friend (*m*). Of course a person of unsound mind can now, by his next friend, commence an action and request a sale (*n*).

[3] In a recent case it had been held that an undertaking to purchase could not be given by a *feme coverte* (*o*); and this decision was probably the cause of the new enactment.

CLAIM FOR PARTITION UNNECESSARY.

39 & 40 Vict. c. 17, § 7.

7. For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale [1] and distribution for the proceeds, and it shall not be necessary to claim a partition.

Partition need not be claimed where sale desired.

[1] This section settles the law in accordance with the view of BACON, V.-C. (*p*). It had been held by LORD ROMILLY, M. R. (*q*), and WICKENS, V.-C. (*r*), that a partition must be asked for even when a sale only was desired. This view was based on the opening words of sects. 3, 4, and 5 of the Act of 1868.

SALE—LEAVE TO BID.

31 & 32 Vict. c. 40, § 6.

6. On any sale under this Act the Court may, if it thinks fit, allow any of the parties interested in the

(*i*) *Young* v. *Young*, L. R. 13 Eq. 175 n.; *France* v. *France*, L. R. 13 Eq. 173, 2 Not. 4217; *Higgs* v. *Dorkis*, L. R. 13 Eq. 280, 2 Not. 4216; *Grove* v. *Comyn*, L. R. 18 Eq. 387, 3 Not. 1718; *Davey* v. *Wietlisbach*, L. R. 15 Eq. 269, 3 Not. 539.

(*k*) *Higgs* v. *Dorkis*, L. R. 13 Eq. 280; *Sherratt* v. *Sherratt*, 21 W. R. 572.

(*l*) *Leigh* v. *Edwards*, 21 W. R. 835.

(*m*) *Halfhide* v. *Robinson*, L. R. 9 Ch. 373, 3 Not. 1193.

(*n*) *Watt* v. *Leach*, 26 W. R. 475.

(*o*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528—532.

(*p*) *Aston* v. *Meredith*, L. R. 11 Eq. 601, 2 Not. 3466.

(*q*) *Teall* v. *Watts*, L. R. 11 Eq. 213, 2 Not. 3210.

(*r*) *Holland* v. *Holland*, L. R. 13 Eq. 406, 2 Not. 4219.

31 & 32 Vict. c. 40, § 6. Parties interested may be be allowed to bid.

property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court seem reasonable.

Where the owner of a moiety of property consisting of a brick-field, cottage, wharves, and valuable substrata of minerals, occupied and carried on business as a brick and tile maker upon the entirety, liberty was given for him to bid, and in the event of his becoming the purchaser he was only to be required to pay into Court half the purchase money (*s*). And all parties interested in a large estate consisting of several distinct properties were allowed to bid, including persons having the conduct of the sale (*t*).

SECT. 30 OF TRUSTEE ACT, 1850.

31 & 32 Vict. c. 40, § 7. Sect. 30 of Trustee Act, 1850, incorporated.

7. Sect. 30 of the Trustee Act, 1850,[1] shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property.

[1] This section is as follows :—

13 & 14 Vict. c. 40, § 30. Court may declare parties and unborn persons trustees in certain cases, and make orders as to their interests.

30. And be it enacted, that where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any land, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit[1] wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare

(*s*) *Wilkinson* v. *Johnns*, L. R. 16 Eq. 14—18, 3 Not. 834.

(*t*) *Pennington* v. *Dalbiac*, 18 W. R. 684, 2 Not. 3342. See also *Porter* v. *Lopes*, 7 Ch. D. 358.

concerning the interests of unborn persons[2] who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons or the interests of persons who upon coming into existence would be trustees within the meaning of this Act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons born or unborn as the said Court or the said Lord Chancellor might under the provisions of this Act make concerning the estates, rights, and interests of trustees born or unborn.

31 & 32 Vict. c. 40, § 7. 13 & 14 Vict. c. 40, § 30.

[1] A lunatic who was entitled to an undivided share was declared a trustee, and a vesting order was made in respect of his share (*u*); but in another case the committee of a lunatic was directed to execute all necessary assurances (*x*). Lunatic declared trustee.

[2] Parties to a suit were declared trustees, and the interests of unborn persons were declared to be interests of persons who, on coming into existence, would be trustees, in a case where the title was very complicated, and had been proved at great expense (*y*). Unborn persons and right heirs declared trustees.

A similar declaration was made where an undivided share of real estate was limited to A. for life, with remainder (after intermediate limitations) to his "right heirs." It was held that the right heirs, being unascertained, came within the meaning of "unborn" persons (*z*). See sect. 3 of the Act of 1876 (*a*).

SECTS. 23—25 OF S. E. ACT, 1856.

8. Sections twenty-three to twenty-five (both inclusive) of the Act of the session of the nineteenth and twentieth 31 & 32 Vict. c. 40, § 8.

(*u*) *Re Molyneux*, 10 W. R. 512.
(*x*) *Re Sherard; Lowther* v. *Cuffe*, 1 D. J. & S. 421.
(*y*) *Lees* v. *Coulton*, *Lees* v. *Clutton*, L. R. 20 Eq. 20, 3 Not. 1925.
(*z*) *Basnett* v. *Moxon*, L. R. 20 Eq. 182—185, 3 Not. 2239.
(*a*) *Infra*, p. 138.

31 & 32 Vict. c. 40, § 8.

years of Her Majesty's reign (chapter one hundred and twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this Act.[1]

Sects. 23—25 of S. E. Act, 1856, incorporated.

[1] These sections contain provisions similar to those of sects. 34, 35 and 36 of the Settled Estates Act, 1877, which are printed *in extenso* at pp. 188-192, *infra*, where the differences between their provisions and those of the Act of 1856, are pointed out.

Where the money produced by a sale had been paid into Court, and some of the persons equitably interested therein were abroad and under disability, the Court refused to order the fund to be paid out to trustees who held powers of attorney (*b*). But in another case an order was made directing trustees to sell and divide the profits without the intervention of the Court (*c*).

Whether order for sale operates as conversion.

When infants are entitled as part owners of property ordered to be sold, their shares of the proceeds of sale will be treated as real estate (*d*). But where a part owner died before sale, his share was held to be converted and to go to his personal representatives (*e*), although he had not attained twenty-one (*f*). And the same rule was applied to the case of a married woman dying after sale, but before payment out of the proceeds (*g*). But this case has not been followed by the present MASTER OF THE ROLLS (*h*).

PARTIES TO ACTION.

31 & 32 Vict. c. 40, § 9.

9. Any person who, if this Act had not been passed, might have maintained a suit for partition[1] may maintain such suit against any one or more of the parties interested without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause[2] the Court may direct such inquiries as

Who may maintain action.

(*b*) *Aston* v. *Meredith*, L. R. 13 Eq. 492, 2 Not. 3510.
(*c*) *Hayward* v. *Smith*, 20 L. T. N. S. 70.
(*d*) *Foster* v. *Foster*, 1 Ch. D. 588, 3 Not. 2462.
(*e*) *Arnold* v. *Dixon*, L. R. 19 Eq. 113.
(*f*) *Steed* v. *Preece*, L. R. 18 Eq. 192, 3 Not 1248.
(*g*) *Fowler* v. *Scott*, 19 W. R. 972.
(*h*) *Mildmay* v. *Quicke*, 6 Ch. D. 553.

to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration;[3] but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing,[4] and after such notice, shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order.

31 & 32 Vict. c. 40, § 9.

[1] Co-parceners have a common law right, and joint tenants, and tenants in common, a statutory right (*i*) to partition. This right extends to lands of copyhold or customary (*k*) as well as of freehold tenure. And it is immaterial whether their joint interests are in estates of inheritance, or in estates for life (*l*), or terms of years (*m*). But, as regards terms of years, a distinction has been drawn between a long term in which the reversion is merely nominal (*n*) and a short term under a lease with joint liability to rent and covenants (*o*). And as regards life estates and terms of years it is expressly provided that the partition shall not be prejudicial or hurtful to "anny personne or personnes, their heirs or successours, other than suche whiche be parties unto the said partition, their executors or assigneis" (*p*).

Who may bring action for partition. Copyholds. Life estates. Terms of years.

Partition may be decreed at the instance of a mortgagee (*q*) or lessee (*r*) of an undivided share. But the legal title must be before the Court, unless it is outstanding in a mortgagee. Trustees represent their *cestuis que trustent*, whether as plaintiffs or defendants (*s*).

Mortgagee Lessee. Trustee.

Where three persons were entitled as tenants in common in fee subject to an executory devise over, a sale was ordered under this Act subject to the executory devise (*t*).

(*i*) 31 Hen. 8, c. 1.
(*k*) 4 & 5 Vict. c. 35, s. 85; 21 & 22 Vict. c. 94.
(*l*) 32 Hen. 8, c. 32; *Wills* v. *Slade*, 6 Ves. 498; *Gaskell* v. *Gaskell*, 6 Sim. 643.
(*m*) 32 Hen 8, c. 32; *Baring* v. *Nash*, 1 Ves. & B. 551; *Ames* v. *Collins*, 16 W. R. 74.
(*n*) *Baring* v. *Nash*, 1 Ves. & B. 551.
(*o*) *North* v. *Guinan*, Beat. 342.
(*p*) 32 Hen. 8, c. 32.
(*q*) *Fall* v. *Ekins*, 9 W. R. 861.
(*r*) *Heaton* v. *Deardon*, 16 B. 147.
(*s*) *Stace* v. *Gage*, 8 Ch. D. 451.
(*t*) *Groves* v. *Carbut*, 29 L. T. N. S. 129.

31 & 32 Vict. c. 40, § 9.

An action for partition can only be maintained by a part-owner of an estate in possession. A reversioner cannot bring such an action (*u*). But where infants were entitled as co-heiresses, subject to the dower of their mother (who was living), an order for sale was made —apparently by consent (*v*).

Not reversioner.

It has been held that a part-owner whose interest was not originally sufficient to maintain a suit could not obtain a sale by amending his bill and stating that he had since acquired such an interest. He ought to have dismissed his bill and filed another (*x*). But under the present practice the Court would, in such a case, exercise its power of allowing the plaintiff to amend under the Rules of Court, 1875 (*y*).

Proceedings at the hearing.

[2] An immediate order for sale can be made at the hearing where the title is proved (*z*), but will not be made unless all persons in existence who are interested are parties (*a*); or are proved to be out of the jurisdiction (*b*). See notes to sect. 3 of the Act of 1876 (*c*).

In other cases the usual course is to make an order for inquiries at the hearing and to make the order for sale on further consideration.

Motion on admissions.

Where the allegations in the statement of claim making out the title of the plaintiff are admitted by the statement of defence, the plaintiff may move upon admissions in the pleadings under the Rules of Court, 1875 (*d*), for the usual inquiries (*e*).

Evidence of title.

But if no defence has been delivered, the plaintiff should file a short affidavit concisely verifying the allegations of the statement of claim, although the defendant consents to the judgment asked for (*f*).

Whether contested questions will be decided at the hearing.

Before the Judicature Acts came into operation the Court at the hearing, on some occasions, decided questions of construction arising incidentally in partition suits (*g*), and, by consent, declared the rights of parties (*h*), including infants (*i*).

But it was held that partition suits were within the administrative and not the contentious jurisdiction of the Court (*k*), and where the

(*u*) *Evans* v. *Bagshaw*, L. R. 8 Eq. 469, L. R. 5 Ch. 340, 2 Not. 2101, 9659; *Cass* v. *Wood*, 30 L. T. 670.

(*v*) *Grove* v. *Comyn*, L. R. 18 Eq. 387, 3 Not. 1718.

(*x*) *Evans* v. *Bagshaw*, L. R. 8 Eq. 469, L. R. 5 Ch. 340.

(*y*) R. S. C., Ord. xxvii. r. 1.

(*z*) *Lees* v. *Coulton*, *Lees* v. *Clutton*, L. R. 20 Eq. 20, 3 Not. 1925.

(*a*) *Ibid.*; *Mildmay* v. *Quicke*, L. R. 20 Eq. 537, 3 Not. 2389.

(*b*) *Silver* v. *Udall*, L. R. 9 Eq. 227, 2 Not. 2571.

(*c*) 39 & 40 Vict. c. 17, *infra*, p. 139.

(*d*) R. S. C., Ord. xl. r. 11.

(*e*) *Gilbert* v. *Smith*, 2 Ch. D. 687.

(*f*) *Senior* v. *Hereford*, 4 Ch. D. 494.

(*g*) *Hurry* v. *Hurry*, L. R. 10 Eq. 346, 2 Not. 2857.

(*h*) *Burt* v. *Hellyar*, L. R. 14 Eq. 160—166, 2 Not. 4540.

(*i*) *Davey* v. *Weitlisbach*, L. R. 15 Eq. 269, 3 Not. 539; *Grove* v. *Comyn*, L. R. 18 Eq. 387, 3 Not. 1718.

(*k*) *Burt* v. *Hellyar*, L. R. 14 Eq. 166.

plaintiff's title was contested the Court refused to decide the question, and retained the bill for a year with liberty to the plaintiff to bring such action as he might be advised (*l*).

31 & 32 Vict. c. 40, § 9.

But now, sect. 24, sub-sect. 7, of the Judicature Act, 1873 (*m*), appears to make it compulsory for the Court to decide every claim properly brought forward in any cause or matter.

Meaning of "further consideration."

[3] "Further consideration" does not necessarily mean technical further consideration in Court. "I should take the words in a popular sense as referring to any consideration the cause receives after the inquiries have been made." *Per* LORD CAIRNS, C. (*n*).

In such cases it depends upon the result of the inquiries whether a sale will be ordered or not (*o*), and it has been held that a sale before certificate is not binding upon the purchaser, even though the certificate when made would justify a sale (*p*). On the other hand, a sale before the answer to a special inquiry as to a party presumed to be dead, has been supported (*q*).

In a recent case judgment was given directing inquiries as to the persons interested and whether they were parties; and ordering a sale if it should appear that the plaintiffs were interested to the extent of a moiety and requested a sale, and all other persons interested were parties; but giving liberty to apply in chambers for a sale (after the proper notices had been served) if all persons interested should not appear to be parties (*r*).

A sale may be directed to take place in chambers, before the chief clerk, either by auction or by tender, and the chief clerk may himself be allowed to sell by auction, without employing an auctioneer (*s*).

[4] As to the necessary parties, see notes to sect. 3 of the Act of 1876, p. 139, *infra*.

Where a defendant entitled to one-sixth share was in possession of the property (without any contract of tenancy) the Court refused after an order for sale, to restrain him from selling hay and turnips off the land contrary to the custom of the country, but *semble* that any act amounting to waste would have been restrained (*t*).

(*l*) *Slade* v. *Barlow*, L. R. 7 Eq. 296, 2 Not. 1625; *Bolton* v. *Bolton*, L. R. 7 Eq. 298, n., 17 W. R. 366, 2 Not. 1625; *Ward* v. *Ward*, 18 W. R. 87; *Giffard* v. *Williams*, L. R. 5 Ch. 546 (reversing L. R. 8 Eq. 494), 2 Not. 2057.

(*m*) 36 & 37 Vict. c. 66.

(*n*) *Powell* v. *Powell*, L. R. 10 Ch. 130—134; Cf. *Mildmay* v. *Quicke*, L. R. 20 Eq. 537—8, 3 Not. 2389.

(*o*) *Buckingham* v. *Sellick*, 22 L. T. 370.

(*p*) *Powell* v. *Powell*, L. R. 10 Ch. 130.

(*q*) *Rawlinson* v. *Miller*, 1 Ch. D. 52, 4 Not. 106.

(*r*) *Senior* v. *Hereford*, 4 Ch. D. 494, 4 Not. 625. Compare *Underwood* v. *Stewardson*, 20 W. R. 668; *Harper* v. *Bird*, 23 W. R. 646.

(*s*) *Pemberton* v. *Barnes*, L. R. 13 Eq. 349—353, 2 Not. 4220.

(*t*) *Bailey* v. *Hobson*, L. R. 5 Eq. 180—182, 2 Not. 2598.

SERVICE ON ABSENT PERSONS.

39 & 40 Vict. c. 17, § 3.

Power to Court to dispense with service of judgment on certain persons interested.

3. Where in an action for partition it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served,[1] or cannot be so served without expense disproportionate to the value of the property to which the action relates,[2] the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service[3] on any person or class of persons specified in the order, and, instead thereof, may direct advertisements[4] to be published at such times and in such manner as the Court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the Court, under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.

[1] Under the Act of 1868 (*u*) it had been held that the Court need not make an order for sale or partition in the absence of any of the

(*u*) See sect. 9, *ante*, p. 134.

persons interested (*x*), but that an order *could* be made if such persons were proved to be abroad (*y*). And where a person who, if living, would be entitled to one twenty-fourth of the property, had not been heard of for fourteen years, a sale was ordered in his absence (*z*). It was also held that, where one of seven tenants in common had not been heard of for seventeen years, a good title to the property could be made by the other six (*a*). 39 & 40 Vict. c. 17, § 3.

[3] On the other hand, where a defendant entitled to one forty-fifth of the property was out of the jurisdiction, the Court refused to order a sale until he had been served (*b*). Parties out of jurisdiction.

[3] And even where an immediate decree for a sale was made in the absence of parties proved to be abroad, it was held that such order ought not to be acted upon until notice had been given to the absent parties by advertisement (*c*).

[4] And in a subsequent case LORD ROMILLY doubted whether notice by advertisement was sufficient *service* under sect. 9 of the principal Act (*d*). This doubt is, of course, set at rest by the above section.

Where trustees were before the Court, service on the persons beneficially interested was dispensed with (*e*).

DISTRIBUTION OF PROCEEDS.

4. Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect: 39 & 40 Vict. c. 17, § 4.

Proceeds of sale how dealt with.

(1.) The proceeds of sale shall be paid into court to abide the further order of the Court:

(2.) The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:

(3.) The Court shall direct such notices to be given by advertisements or otherwise as it thinks best

(*x*) *Dodds* v. *Gronow*, 17 W. R. 511.
(*y*) *Silver* v. *Udall*, L. R. 9 Eq. 227, 2 Not. 2571.
(*z*) *Jackson* v. *Lomas*, 23 W. R. 744.
(*a*) *Rawlinson* v. *Miller*, 1 Ch. D. 52, 4 Not. 106.
(*b*) *Hurry* v. *Hurry*, L. R. 10 Eq. 346—348.
(*c*) *Peters* v. *Bacon*, L. R. 8 Eq. 125.
(*d*) *Teall* v. *Watts*, L. R. 11 Eq. 213.
(*e*) *Stace* v. *Gage*, 8 Ch. D. 451.

39 & 40 Vict. c. 17, §4.

adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made:

(4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute the proceeds in accordance with the rights of those persons:

(5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the Court to have any primâ facie rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may

recover from any participating person any portion received by him of the share of the excluded person. 39 & 40 Vict. c. 17, § 4.

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time. 39 & 40 Vict. c. 17, § 5. Marshalling of proceeds where two sales.

COSTS.

10. In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing. 31 & 32 Vict. c. 40, § 10. Costs up to hearing.

Although Lord Romilly, M. R., was, at one time, of a contrary opinion (*e*), it is now settled that this section alters the old rule under which all parties paid their own costs up to the hearing. There is, now, no general rule as to costs (*f*); they will depend on the particular circumstances of each case. Sometimes the old rule will still be followed (*g*); but the more usual course has been to The Court now has a discretion as to costs.

(*e*) *Landell* v. *Baker*, L. R. 6 Eq. 268, 2 Not. 1226.

(*f*) *Simpson* v. *Ritchie*, L. R. 16 Eq. 103, 3 Not. 422.

(*g*) *Wilkinson* v. *Joberns*, L. R. 6 Eq. 14—17, 3 Not. 834; *Simpson* v. *Ritchie*, L. R. 16 Eq. 103—104, 3 Not. 422.

31 & 32 Vict. c. 40, § 10.

charge the whole costs upon the proceeds of sale (*h*); and in the absence of special circumstances arising from the conduct of any of the parties, LORD ROMILLY thought this ought to be the rule (*i*).

POWER TO MAKE RULES.

30 & 31 Vict. c. 40, § 11.

11. Sections nine, ten, and eleven of The Chancery Amendment Act, 1858, relative to the making of general orders, shall have effect as if they were repeated in this Act, and in terms made applicable to the purposes thereof.

Sects. 9-11 of Chancery Amendment Act, 1858, incorporated.

These sections gave power to make rules and orders for carrying into effect the purposes of the Act; but as such powers have not been exercised, it is unnecessary to do more than refer to them.

COUNTY COURTS—JURISDICTION.

30 & 31 Vict. c. 40, § 12.

12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this Act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of The County Courts Act, 1865.

Jurisdiction of County Courts.

(*h*) *Osborn* v. *Osborn*, L. R. 6 Eq. 338, 2 Not. 1226; *Miller* v. *Marriott*, L. R. 7 Eq. 1, 2 Not. 1830; *Leach* v. *Westall*, 17 W. R. 313; *France* v. *France*, L. R. 13 Eq. 173, 2 Not. 4217; *Thompson* v. *Richardson*, I. R. 6 Eq. 596—598.

(*i*) *Cannon* v. *Johnson*, L. R. 11 Eq. 90, 2 Not. 3209.

CONTINGENT REMAINDERS.

8 & 9 Vict. c. 106, s. 8.
40 & 41 Vict. c. 33.

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8 & 9 Vict. c. 106, s. 8.

An Act to Amend the Law of Real Property.

8 & 9 Vict. c. 106, § 8.

Contingent remainders protected as from 31st Dec. 1844 against the premature failure of a preceding estate.

8. That a contingent remainder[2] existing at any time after the 31st day of December, 1844,[1] shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination,[3] by forfeiture,[4] surrender,[5] or merger,[6] of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

[1] It will be observed that this section is so far retrospective as to include all contingent remainders existing after the 31st of December, 1844, whether created before or after the passing of the Act to amend the law of real property (*a*). The "Act to amend the law as to contingent remainders" of 1877 (*b*), is not retrospective.

Retrospective.

[2] A vested remainder is one which is ready to take immediate effect, on the determination of the prior particular estate; while a contingent remainder is one which can only take effect in case some other event happens before or simultaneously with, such determination.

Distinction between vested and contingent remainders.

Formerly it was "not only necessary that a vested legal freehold estate should precede a legal freehold contingent remainder, but some such preceding freehold estate must subsist and endure until the time when the contingent remainder vests; that is, until the time when the contingency comes to pass; for it was a general rule that every

Old law.

(*a*) 8 & 9 Vict., c. 106.
(*b*) 40 & 41 Vict., c. 33, *infra*, p. 145.

8 & 9 Vict. c. 106, § 8.

remainder must vest, either during the particular estate, or else at the very instant of its determination" (*c*). It followed, from this rule that all remainders which were still contingent when the prior particular estate determined were destroyed, and the next remainder then vested took effect.

Contingent remainders formerly liable to destruction.

[3] The prior particular estate might determine prematurely by—

(*α*) Forfeiture,

(*β*) Surrender, or

(*γ*) Merger,

or it might expire naturally.

Forfeiture of prior estate.

[4] Forfeiture was usually caused by the owner of the particular estate making a feoffment, levying a fine, or suffering a recovery; but it might also be incurred in other ways. Forfeiture by feoffment was abolished by the "Act to amend the Law of Real Property" (*d*), sect. 4 of which provides that a feoffment shall not have any tortious operation, while fines and recoveries were abolished by 3 & 4 Wm. 4, c. 74, which was passed in 1833.

The case of forfeiture by any other means is provided for by sect. 8 of the "Act to amend the Law of Real Property," which is printed above.

Surrender of prior estate.

[5] A surrender of a particular estate to the owner of a vested remainder determined the particular estate and consequently destroyed all intermediate contingent remainders. This case is also provided for by sect. 8 of the "Act to amend the Law of Real Property."

Merger of prior estate.

[6] When the particular estate and the ultimate remainder in fee became vested in the same person, the former was merged in the fee simple, and the effect as regards contingent remainders was the same as a surrender. This case is also provided for by the last-mentioned enactment.

The device of limiting estates to trustees to preserve contingent remainders, in case of the *premature failure* of the prior particular estate was thus rendered unnecessary.

Natural expiration of prior estate.

But contingent remainders which had not become vested on the *natural termination* of the prior particular estate were still destroyed (*e*), except when the contingency was the birth of a child *en ventre sa mère* at the termination of the prior estate, which case is provided for by 10 & 11 Wm. 3, c. 16.

(*c*) Fearne C. R., 10th ed., 307.

(*d*) 8 & 9 Vict. c. 106.

(*e*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393, 4 Not. 365; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *Perceval* v. *Perceval*, L. R. 9 Eq. 386, 2 Not. 2617; *Holmes* v. *Prescott*, 12 W. R. 636, 1 Not. 2059; *Festing* v. *Allen*, 12 M. & W. 279.

The law has now been altered by the "Act to amend the Law as to Contingent Remainders" (*f*), which was passed on the 2nd of August, 1877, and is as follows :— 8 & 9 Vict. c. 106, § 8.

New enactment.

40 & 41 Vict. c. 33.

An Act to amend the Law as to Contingent Remainders.

Be it enacted, &c.

40 & 41 Vict. c. 33, § 1.

1. Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date,[1] in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder,[2] shall, in the event of the particular estate determining before the contingent remainder vests,[3] be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.[4]

Cases in which contingent remainders capable of taking effect.

[1] It will be observed that this enactment is not retrospective. The old law will, consequently, apply to contingent remainders created before the 2nd of August, 1877.

Not retrospective.

[2] "A springing or shifting use or an executory devise differs from a contingent remainder, not only as an equitable necessarily differs from a legal estate, but also in this, that instead of depending on a preceding particular estate and co-existing with it as an ulterior part of the same fee simple, it springs up independently at a distance of time, in defiance rather than evasion of the rule, that the operation of every conveyance must be immediate; or at least if it did depend upon a particular estate it was upon one of a new kind, unknown, as such, to the law: namely, a fee simple of limited duration, which the common law might allow to subsist by itself, but would by no means admit of a remainder after it, because a fee simple was the greatest possible estate; and whatever qualifications might be

Distinction between springing use and contingent remainder.

(*f*) 40 & 41 Vict. c. 33.

40 & 41 Vict. c. 33, § 1.

annexed to it, it was a fee simple still. But, without regard to such technical scruples, it was settled that, in equity, a deferred or future interest might be created in the first instance; the grantor retaining or a third person taking, not a particular estate, as for a certain number of years, for life, or in tail, but the entire inheritance, determinable only upon the happening of that event (if it happened at all) upon which the future interest (called a springing or shifting use) was to arise" (*g*).

Effect of Act of 1877.

The rule has, hitherto, been that no limitation which could be construed as a contingent remainder (*i.e.* which was supported by a prior particular estate) should be construed as a springing or shifting use, or an executory devise (*h*). The effect of this enactment will be to reverse that rule.

[3] This provides for the determination of the particular estate, by whatever means. See notes to 8 & 9 Vict. c. 106, s. 8 (*i*).

Application of rule against remoteness to cases under Act of 1877.

[4] A legal contingent remainder expectant on an estate tail could never be void on the ground of remoteness (*k*); but a springing or shifting use or executory devise must take effect within twenty-one years after the expiration of specified existing lives (with an allowance for gestation if it actually exists (*l*)). And any executory estate which might possibly infringe this rule is absolutely void.

The effect of this Act is to apply the last-mentioned rule to contingent remainders which depend upon it for their validity. For such contingent remainders are to take effect only in case they would have been valid as executory estates.

(*g*) Burton, R. P., 5th ed., 39—40.
(*h*) *Carwardine* v. *Carwardine*, 1 Eden. 27.
(*i*) *Ante*, p. 143—4.
(*k*) *Cole* v. *Sewell*, 4 Dr. & War. 1; 2 H. L. C. 1—28; Sugd., R. P., 116—121.
(*l*) *Bengough* v. *Edridge*, 1 Sim. 173; *Cadell* v. *Cadell*, 1 Cl. & F. 372.

EXONERATION OF CHARGES.

17 & 18 Vict. c. 113.
30 & 31 Vict. c. 69.
40 & 41 Vict. c. 34.

17 & 18 VICT. C. 113.

An Act to amend the law relating to the administration of the estates of deceased persons.

17 & 18 Vict. c. 113. Preamble.

WHEREAS it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended.[1] Be it enacted, &c.

Old law.

Mortgages formerly payable out of personalty.

[1] Equity regards a mortgage merely as a security for money; and, before this enactment, money so secured formed no exception to the general rule that all the debts of a testator or intestate, were, in the absence of some special provision, payable primarily out of his personal estate. And even where mortgaged real estate was specifically devised "subject nevertheless to the mortgages affecting the same" it was held that the testator's personal estate was primarily liable to pay the mortgage debts (*a*). In that case, however, the testator had directed his debts to be paid out of his personal estate, and had charged them on his real estate in case the personalty should prove insufficient.

But the rule is stated by LORD HATHERLEY (then V.-C. WOOD) as follows:—

"It has long since been settled by the authorities to which I have referred (*b*), that a devise of an estate, expressed to be subject to a mortgage, in no way imposes upon the devisee any liability in respect of the mortgage" (*c*).

This rule, however, only applied as between the real and personal

(*a*) *Townshend* v. *Mostyn*, 27 B. 72.
(*b*) *Galton* v. *Hancock*, 2 Atk. 430; *Watson* v. *Brickwood*, 9 Ves. 447; *Lockhart* v. *Hardy*, 9 B. 379.
(*c*) *Goodwin* v. *Lee*, 1 K. & J. 377—380.

17 & 18 Vict. c. 113. Preamble.

representatives of the testator or intestate and not as between his personal representatives, and the real representatives of his heir or devisee. Thus, where a testator who had devised mortgaged real estate to his wife in fee, and also bequeathed his personal estate to her, died in 1854, and his wife died two days afterwards, it was held that *her* heir was not entitled to hold the property exonerated from the mortgage (*d*). And the rule would yield to an expression of a contrary intention. For instance, a testator directed his trustees to receive the rents of his real and leasehold estates and apply the same in payment, *inter alia*, of all his just debts, together with all principal money and interest owing upon mortgage of his property. He also gave mortgaged leaseholds to A., B. & C., and unincumbered leaseholds to D., and died possessed of no freehold estate. It was held that all the leaseholds, according to their respective values, must contribute rateably to the payment of his debts, including mortgage debts (*e*).

Old law.

Unless contrary intention.

17 & 18 Vict. c. 113, § 1.

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land[1] or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage,[2] and such person shall not by his will or deed,[3] or other document, have signified any contrary or other intention,[4] the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:[5] Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his

Mortgages payable out of real estate thereby charged unless contrary intention expressed.

(*d*) *Swainson* v. *Swainson*, 6 D. M. G. 648.

(*e*) *Harper* v. *Munday*, 7 D. M. G. 369.

mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect[6] the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five.[7]

17 & 18 Vict. c. 113, § 1.

Interest in land.

[1] Copyholds are within the Act (*f*), but leaseholds for years are not (*g*), as regards testators or intestates dying before 31st December, 1877 (*h*).

Copyholds. Leaseholds for years.

And it would probably be held that leaseholds for lives are not within Locke King's Act, or the Act of 1867 (*i*). But where freeholds and leaseholds were comprised in the same mortgage, it was held in 1862, that they must bear the burden rateably (*k*). And the same rule was recently applied to a case where the mortgage comprised both real and other personal estate (*l*).

Leaseholds for lives.

A testator who died in 1870, was entitled to an undivided third part of mortgaged real estate settled upon trusts for sale and distribution of the proceeds, with a proviso that any beneficiary might enjoy his share *in specie*, but that it should be deemed personal estate. MALINS, V.-C., held that it was not an interest in land within the meaning of the Act. The Act contemplates the taking of land *qud* land (*m*)

"Interest in land."

[2] The Act only applies "where there is a defined and specified charge on a specific estate, and to the extent of that charge."—*Per* LORD ROMILLY, M.R. (*n*). Therefore a general charge of real estate by will, in case the personal estate shall be insufficient, is not a charge or mortgage within the Act (*o*).

What is a "mortgage?"

An equitable mortgage by deposit is within the Act (*p*), whether there be an agreement to execute a legal mortgage (*q*) or not (*r*),

Equitable mortgage.

(*f*) *Rowson* v. *Harrison*, 31 B. 207; *Piper* v. *Piper*, 1 J. & H. 91; *Nelson* v. *Page*, L. R. 7 Eq. 25; 2 Not. 2204.

(*g*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; 1 Not. 2155; *Re Wormsley; Hill* v. *Wormsley*, 4 Ch. D. 665; 4 Not. 603.

(*h*) See 40 & 41 Vict. c. 34, p. 156, *infra*.

(*i*) See and consider *Blake* v. *Luxton*, 6 T. R. 289—291; *Ripley* v. *Waterworth*, 7 Ves. 425—437.

(*k*) *Evans* v. *Wyatt*, 31 B. 217; 1 Not. 1129.

(*l*) *Trestrail* v. *Mason*, 7 Ch. D. 655.

(*m*) *Lewis* v. *Lewis*, L. R. 13 Eq. 219; 2 Not. 4457.

(*n*) *Hepworth* v *Hill*, 30 B. 476—483.

(*o*) *Ibid.*

(*p*) *De Rochfort* v. *Dawes*, L. R. 12 Eq. 540; 2 Not. 4760.

(*q*) *Coleby* v. *Coleby*, L. R. 2 Eq. 803.

(*r*) *Pembrooke* v. *Friend*, 1. J. & H. 132.

17 & 18 Vict. c. 113, § 1.

even though there may be no memorandum of deposit (*s*). A vendor's lien was held not to be a mortgage within this Act. See note 2 to sect. 2 of the Amendment Act of 1867 (*t*).

Charge by deed.

[3] In 1855 A. conveyed mortgaged real estate in Scotland to B. in fee, "with and under the burden of the payment of the real or heritable debts which affect the said lands, and also with and under the burden of the payment of the real debts or mortgages which affect my property in the Isle of Wight." By his will in 1855 he also devised his lands in the Isle of Wight to B. It was, of course, held that B. was not entitled to have the Isle of Wight mortgages paid out of A.'s personal estate (*u*).

What is not a contrary intention in wills before 1868.

[4] A testator, who died in 1864, directed the payment of his just debts as soon as could be after his decease, and devised mortgaged real estate in strict settlement, with trusts (*inter alia*) to keep down the interest of any sum which might be charged thereon by way of mortgage. It was held that he had not thus "signified any contrary or other intention" (*x*). As regards testators whose wills were made after 1st January, 1855, and who died before 31st December, 1867, it has been held that no "contrary or other intention" was signified by a direction by the testator that all his just debts be paid as soon as convenient after his decease (*y*); a direction that all his just debts be paid out of his estate (*z*); a direction that all his just debts be paid and discharged by his executors as soon as convenient out of his estate (*a*); a direction that all his just debts should be paid by his executors as soon as convenient out of his personal estate (*b*). In all these cases there was a specific devise of mortgaged real estate.

What is a contrary intention in wills before 1868.

On the other hand, a "contrary or other intention" has been held to be signified by testators who died before 31st December, 1867, by a gift of residuary real and personal estate "after paying my mortgage and other debts" (*c*); by a gift of residuary real and personal estate "subject in the first place to the payment and satisfaction of my just debts" (*d*); by a bequest of personal estate "subject to payment thereout of all my just debts" (*e*); by a bequest of personal

(*s*) *Davis* v. *Davis*, 24 W. R. 962.
(*t*) 30 & 31 Vict. c. 69, p. 155, *infra*.
(*u*) *Smith* v. *Moreton*, 37 L. J. Ch. 6.
(*x*) *Coote* v. *Lowndes*, L. R. 10 Eq. 376; 2 Not. 2935.
(*y*) *Pembrooke* v. *Friend*, 1 J. & H. 132.
(*z*) *Brownson* v. *Lawrance*, L. R. 6 Eq. 1—5; 2 Not. 931.
(*a*) *Woolstencroft* v. *Woolstencroft*, 2 D. F. J. 347 (reversing 2 Giff. 192).
(*b*) *Rowson* v. *Harrison*, 31 B. 207.
(*c*) *Greated* v. *Greated*, 26 B. 621—629.
(*d*) *Stone* v. *Parker*, 1 Dr. & Sm. 212.
(*e*) *Mellish* v. *Vallins*, 2 J. & H. 194.

estate "subject to the payment of my debts" (*f*); by a declaration that the testator's personal estate should be liable to the payment of all his just-debts (*g*); by a bequest of personal estate upon trusts for sale and conversion, and, *inter alia*, payment of all just debts (*h*), although certain specialty debts, not including the mortgage debts, were expressly mentioned (*i*), and although the devisee of the mortgaged estate was himself one of the executors (*k*); by a declaration that residuary real estate should bear all mortgages charged thereon, and that all debts should be paid out of residuary estate (*l*); and also by a gift of residuary real estate (*m*), or of residuary real and personal estate upon trust for sale and, *inter alia*, payment of all just debts (*n*).

There was a specific devise, or a disposition equivalent thereto, in all these cases; and the basis of the decisions appears to be that other sources were expressly provided for payment. It is settled that as regards testators dying before 1868 the word "debts" is sufficient to include mortgage debts, unless a contrary intention appears (*o*). As to testators dying since the Act of 1867, see *Newmarch* v. *Storr*, 22 Sol. J. 545.

The following remarks of LORD WESTBURY, C., are worthy of note:—"I may remark that I should be unwilling to hold that a mere technical rule of interpretation is to be regarded in all cases as sufficient to exclude, or signifying marks of intention so as to bring the case within the statute, and that it may probably be better to rest each case on its own particular circumstances, collecting the signification and intention in every particular case, not from the words only, but from the whole will and the nature of the gifts made by the will (*p*).

See the cases upon residuary and specific devises in the next note; and as to the rule applicable to testators dying between 31st December, 1867, and 31st December, 1877, see the Amendment Act of 1867 (*q*), and notes thereto. As to testators dying after that date, see the Exoneration of Charges Act, 1877 (*r*).

(*f*) *Eno* v. *Tatham*, 1 N. R. 529; 1 Not. 104.

(*g*) *Rodhouse* v. *Mold*, 12 L. T. N. S. 629; 1 Not. 4316.

(*h*) *Moore* v. *Moore*, 1 De G. J. & S. 602.

(*i*) *Porcher* v. *Wilson*, 12 W. R. 1001.

(*k*) *Smith* v. *Smith*, 3 Giff. 263—275.

(*l*) *Allen* v. *Allen*, 30 B. 395.

(*m*) *Newman* v. *Wilson*, 31 B. 33; 1 Not. 570.

(*n*) *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407; 2 Not. 102; *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506; 2 Not. 2859; see also *Dacre* v. *Patrickson*, 1 Dr. & S. 186—191.

(*o*) *Stone* v. *Parker*, 1 Dr. & Sm. 212; *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506; 2 Not. 2859.

(*p*) *Rolfe* v. *Perry*, 3 De G. J. & S. 486; 1 Not. 569.

(*q*) 30 & 31 Vict. c. 69, p. 154, *infra*.

(*r*) 40 & 41 Vict. c. 34, p. 156, *infra*.

17 & 18 Vict. c. 113, § 1.

[5] Where a testator (who died in 1856 intestate as to a mortgaged estate) by will made in 1855 specifically devised another estate also charged with the same debt, it was held that the devised estate was exonerated, and the whole debt was primarily payable out of the descended estate (*s*).

Contribution between separate properties comprised in the same mortgage.

And on the principle that since the Wills Act (*t*) a residuary devise is not specific (*u*), it was held that where two estates or parts of an estate were subject to a mortgage, and one was specifically devised, while the other passed by a residuary devise, the mortgage debt was primarily payable out of the latter to the exoneration of the former (*x*).

But this decision has since been overruled, and it has been held that in such a case each estate or part of an estate must bear a proportionate part of the mortgage debt (*y*). "It does not appear to me that Locke King's Act was intended to apply as between specific and residuary devises in the way it was held to apply in *Brownson* v. *Lawrance*."—*Per* JESSEL, M. R. (*z*).

A testator deposited the deeds relating to his X. estate with his bankers, to secure the balance of his account. Subsequently he deposited the deeds of another estate, saying he required further advances, which were made. Soon afterwards he died, having specifically devised (by will made in 1862) both estates. Held that the amount owing up to the time of the second deposit must be borne by the X. estate, and that, after deducting that amount from the value of the X. estate, both estates must contribute rateably to the payment of the balance (*a*). And, similarly, where the X. estate was mortgaged to secure 1500*l.*, and subsequently the same estate with other real estate and a policy of assurance were mortgaged to secure further advances, it was held, on the death, intestate, of the mortgagor, in 1867, that the X. estate was primarily liable to pay the 1500*l.*, and that the further advances must be apportioned rateably between the real (including X.) estate and the policy (*b*). And although leaseholds, if mortgaged alone, were not within the Act it was held in 1862 that when freeholds and leaseholds were mortgaged together

(*s*) *Stringer* v. *Harper*, 26 B. 33.
(*t*) 1 Vict. c. 26.
(*u*) *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 242.
(*x*) *Brownson* v. *Lawrance*, L. R. 6 Eq. 1—6; 2 Not. 846, 931; and compare *Rodhouse* v. *Mold*, 12 L. T. N. S. 629; 1 Not. 4316.
(*y*) *Gibbins* v. *Eyden*, L. R. 7 Eq. 371—375; 2 Not. 1758; *Sackville* v. *Smyth*, L. R. 17 Eq. 153; 3 Not. 1144.
(*z*) *Ibid*, 155.
(*a*) *De Rochfort* v. *Dawes*, L. R. 12 Eq. 540; 2 Not. 4760. Compare *Newmarch* v. *Storr*, 22 Sol. J. 545.
(*b*) *Lipscombe* v. *Lipscombe*, L. R. 7 Eq. 501.

17 & 18 Vict. c. 113, § 1.

both must bear the burden rateably (*c*). And the same rule applies where real estate and a policy of assurance are comprised in the same mortgage (*d*).

[6] "Affect" means "injuriously affect" or "prejudice," and does not prevent a legateee from being beneficially affected by the burden of a mortgage debt being thrown on the heir (*e*). Meaning of "affect."

[7] This proviso extends to the case of a devisee only, and not to the case of an intestacy if the intestate died after 1st January, 1855 (*f*), although he may have made a will prior to that date (*g*). And the heir will not be considered as claiming "under or by virtue of" a will, although he only takes a lapsed devise given by will dated prior to 1st January, 1855 (*h*).

A will made before 1st January, 1855, is within this proviso, although it may have been confirmed or republished after that date (*i*).

If the heir claims immediately by descent the fact that a mortgage made before 1st January, 1855, reserves the equity of redemption to the mortgagor *and his heirs* will not bring him within the protection of this proviso (*k*).

30 & 31 Vict. c. 69.

An Act to explain the operation of an Act passed in the 17th & 18th years of Her present Majesty, chapter 113, *intituled "An Act to amend the Law relating to the Administration of the Estates of Deceased Persons."*

30 & 31 Vict. c. 69. Preamble.

WHEREAS by an Act passed in the seventeenth and eighteenth year of Her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which

(*c*) *Evans* v. *Wright*, 31 B. 217.
(*d*) *Trestrail* v. *Mason*, 7 Ch. D. 655; 4 Not. 1602; compare *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.
(*e*) *Power* v. *Power*, 8 Ir. Ch. R. 340; compare 2 Jarman on Wills, 2nd ed., 545.
(*f*) *Piper* v. *Piper*, 1 J. & H. 91; *Day* v. *Day*, 14 W. R. 261.
(*g*) *Power* v. *Power*, 8 Ir. Ch. R. 340.
(*h*) *Nelson* v. *Page*, L. R. 7 Eq. 25—27; 2 Not. 2204.
(*i*) *Rolfe* v. *Perry*, 3 De G. J. & S. 481; 1 Not. 309, 569.
(*k*) *Piper* v. *Piper*, 1 J. & H. 91.

30 & 31 Vict. c. 69. Preamble.

shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

Doubts on construction of Locke King's Act.

And whereas doubts may exist upon the construction of the said Act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted, &c.

30 & 31 Vict. c. 69, § 1.

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate[1] shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Mere direction for debts to be paid out of personalty, not to include mortgage debts.

[1] This section renders the cases cited in note 4 to Locke King's Act (*l*), which were based on the principle that a direction to pay debts out of personal estate provided a fund for payment of mortgage as well as other debts, inapplicable to the estates of testators dying after 31st December, 1867. It will be observed that no mention is made of a general *trust* for payment of debts; and it does not

(*l*) *Ante*, pp. 150—1.

appear to have been decided whether or not such a trust is merely a "general direction" under this section.

30 & 31 Vict. c. 69, § 1.

A testator, who died in 1868, directed all just debts to be paid by his executors as soon as conveniently might be after his decease. As might be expected, this was held insufficient to exonerate a mortgaged estate (*a*).

What is a contrary intention in wills since 1867.

And although the section only refers to *personal* estate, a direction to pay debts out of personal estate, coupled with a charge on residuary real estate in case the personal estate should be deficient, has been held insufficient (*b*).

And an opinion has been expressed by MALINS, V.-C., that a direction for payment of debts out of residuary real and personal estate, although sufficient if the testator died *before* 31st December, 1867, would be insufficient if he died after that date (*c*). A charge of specifically devised real estate "in aid of my personal estate and in exoneration of my other real estate, with the payment of all my just debts and my testamentary expenses," has recently been held insufficient by the Court of Appeal (*d*).

"If a testator who dies after 1867, wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakably to refer to them."—*Per* GIFFARD, V.-C. (*e*).

2. In the construction of the said Act and of this Act, the word "mortgage"[1] shall be deemed to extend to any lien for unpaid purchase-money[2] upon any lands or hereditaments purchased by a testator.

30 & 31 Vict. c. 69, § 2.

Mortgage includes vendor's lien.

[1] As to what is a "mortgage" see note 2 to sect. 1 of Locke King's Act (*f*).

[2] Under the last-mentioned Act it was held that a vendor's lien was not equivalent to a mortgage (*g*).

An intestate died in 1863, seised of a mortgaged estate which had been conveyed to him by X., in consideration of his covenant to pay the mortgage affecting it, and also to pay a sum of 10,000*l.* secured by

(*a*) *Nelson* v. *Page*, L. R. 7. Eq. 28; 2 Not. 2204.
(*b*) *Sackville* v. *Smyth*, L. R. 17 Eq. 53; 3 Not. 1144.
(*c*) *Lewis* v. *Lewis*, L. R. 13 Eq. 219, 225, 227; 2 Not. 4457.
(*d*) *Newmarch* v. *Storr*, 22 Sol. J. 545.
(*e*) *Nelson* v. *Page*, L. R. 7 Eq. 28; 2 Not. 2204.
(*f*) P. 149, *ante*.
(*g*) *Hood* v. *Hood*, 3 Jur. N. S. 684; *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 242.

30 & 31 Vict. c. 69, § 2.

mortgage upon other real estate of X.; and it was held that the 10,000*l.* was equivalent to a vendor's lien, and was primarily payable out of the intestate's personal estate (*h*).

Vendor's lien.

But a vendor's lien ranks as a mortgage for purposes of general administration (*i*); and LORD ROMILLY, M. R. considered that, as regards a legatee's right of marshalling, the distinction between a mortgage and a vendor's lien was untenable. Where a testator had purchased but not paid for, an estate which passed under a general devise in his will, and his personal estate was exhausted in paying the purchase-money, his lordship, accordingly, held that the legatees had a lien upon the estate for their legacies (*k*).

So far as the estates of persons dying between 31st December, 1867, and 31st December, 1877, are concerned, this section does not apply to cases of intestacy (*l*).

As regards persons dying after the latter date, the Act of 1877 places the estates of testators and intestates upon the same footing (*m*).

The last-mentioned Act, the short title of which is the "Exoneration of Charges Act, 1877," is as follows:—

40 & 41 VICT. C. 34.

An Act to amend the Acts seventeenth and eighteenth Victoria, chapter one hundred and thirteen, and thirtieth and thirty-first Victoria, chapter sixty-nine.

Be it enacted, &c.

40 & 41 Vict. c. 34, § 1.

Locke King's Act extended to estates of any tenure, and otherwise amended.

1. The Acts mentioned in the Schedule[1] hereto shall as to any testator or intestate dying after the thirty-first December one thousand eight hundred and seventy-seven,[2] be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure[3] which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money;[4] and the devisee or legatee or heir shall not be

(*h*) *Day* v. *Day*, 14 W. R. 261.
(*i*) *Barnwell* v. *Iremonger*, 1 Dr. & Sm. 242.
(*k*) *Lord Lilford* v. *Powys-Keck*, L. R. 1. Eq. 347.
(*l*) *Harding* v. *Harding*, L. R. 13 Eq. 493; 2 Not. 4687.
(*m*) 40 & 41 Vict. c. 34.

entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.[5] 40 & 41 Vict. c. 34, § 1.

[1] The following is the schedule referred to :—

SCHEDULE. 40 & 41 Vict. c. 34. Schedule.

17 & 18 Vict. c. 113.	An Act to amend the law relating to the adminstration of the estates of deceased persons.
30 & 31 Vict. c. 69.	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

[2] It will be observed that this Act is not retrospective; and therefore the law as settled by the decisions referred to in the preceding notes, will still apply to the estates of persons dying before 31st December, 1877. Not retrospective.

[3] This provision is the result of the decision in *Re Wormsley* (*a*), to the effect that Locke King's Act does not apply to leaseholds.

[4] A vendor's lien will, therefore, be a charge within these Acts, as regards both testators *and intestates* dying after 31st December, 1877. See sect. 2 of the Act of 1867, and notes thereto.

[5] This clause settles the law in accordance with the view expressed by MALINS, V.-C., in *Lewis* v. *Lewis* (*b*), and extends the provision of the Act of 1867 to "residuary real and personal or residuary real estate" as well as personal estate. Contrary intention.

2. This Act shall not extend to Scotland.[1] 17 & 18 Vict. c. 113, § 2. Extent of Acts.

[1] Section 3 of the Act of 1867, and section 2 of the Act of 1877, are in the same words as this section.

(*a*) *Ante*, p. 149. (*b*) L. R. 13 Eq. 219; 2 Not. 4457.

SETTLED ESTATES ACT, 1877.

40 & 41 Vict. c. 18.

An Act to consolidate and amend the Law relating to Leases and Sales of Settled Estates.

40 & 41 Vict. c. 18. Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to leases and sales of settled estates:[1]

Be it enacted, &c.

Settled Estates Act repeals and consolidates provisions of five previous Acts

[1] The original Leases and Sales of Settled Estates Act (*a*) was passed in 1856, and was amended by four successive Acts passed in 1858, 1864, 1874, and 1876 respectively; and as further amendments had been suggested, it was very desirable that all the old Acts should be repealed, and their provisions, with the necessary amendments, embodied in a consolidated form in a new Act. "The Settled Estates Act, 1877," accordingly repeals (*b*) the Acts of 1856, 1858, 1864, 1874 and 1876, and re-enacts their provisions with amendments. Some of the sections of the Act of 1877 are copied *verbatim* from the repealed Acts, and some are copied with merely verbal alterations. Others contain provisions of the earlier Acts with amendments, and some few are entirely new. In the notes to each section of the Act of 1877 it is proposed to point out with what section of the repealed Acts (if any) it corresponds, and whether the old section has been re-enacted *verbatim*, or with any and what alterations. Such of the cases decided under the repealed Acts as are applicable to the Act of 1877, will also be referred to in the notes.

40 & 41 Vict. c. 18, § 1.

1. This Act may be cited for all purposes as "The Settled Estates Act, 1877."

Short title.

(*a*) 19 & 20 Vict. c. 20. (*b*) Sect. 58.

MEANING OF "SETTLED ESTATES."

40 & 41 Vict. c. 18, § 2. Interpretation of "settlement" and "settled estates."

2.[1] The word "settlement" as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.[2]

The term "settled estates"[3] as used in this Act shall signify all hereditaments of any tenure,[4] and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.[5]

[1] The first two paragraphs of this section are copied from, and correspond with, sect. 1 of the Act of 1856, the third paragraph is a re-enactment of the material part of sect. 1 of the Act of 1858, and the fourth is a similar re-enactment of sect. 3 of the Act of 1864.

[2] The word "settlement" of course includes a sub-settlement of a share under a settlement (*c*).

(*c*) *Re Dendy*, 4 Ch. D. 879.

40 & 41 Vict. c. 18, § 2.

What constitutes a "settled estate."

[3] Where real estate was devised to trustees upon trust for sale at their discretion, and investment of the proceeds and payment of the income to one or more persons (successively) for life with remainder over, such estate has been held to be "settled" (*d*). And where real estate was devised upon trust for testator's widow for life, and for sale and distribution at her death, an order for sale has been made during the life of the widow (*e*). Real estate devised upon trust for A. for her separate use on attaining twenty one or marriage, with remainders over in default, was held to be "settled" (*f*). And a similar decision was arrived at where real estate was limited to the use of trustees upon trust for a married woman during the joint lives of herself and her husband, and after her death for such persons as she should (by will if she died during his life, and by deed or will if she survived him) appoint, and in default in trust for her heirs. In this case a petition was presented during the joint lives of the husband and wife (*g*). Trusts to let and manage during the life of A. and the minority of her children, and to pay one moiety of the income to A. during her life, and subject thereto for the children in equal shares, were held to constitute a settled estate; and an order for sale was made on the petition of A., the trustees, and the children (*h*).

So where real estate was devised upon trust for sale with the consent of testator's widow, and subject thereto and to an annuity to her, upon trust for testator's four children at twenty-one or marriage, with benefit of survivorship, an order for sale was made after the death of the widow (*i*). Accruing shares under a settlement constitute a succession, so as to render an estate settled (*k*).

Where some shares are absolutely vested and others are under settlement, the whole estate is considered "settled" (*l*). And where the Court was satisfied that the whole fee simple was vested in one or both of two persons who were petitioners, an order for sale was made (*m*).

Copyholds.

[4] Copyholds have been ordered to be enfranchised and sold as freehold, the cost of enfranchisement being paid out of the proceeds of sale (*n*).

(*d*) *Re Laing*, L. R. 1 Eq. 416; 1 Not. 4924; *Re Chamberlain*, 28 W. R. 852; *Re Greene*, 10 Jur. N. S. 78.

(*e*) *Re Morgan*, L. R. 9 Eq. 587; *Carlyon* v. *Truscott*, L. R. 20 Eq. 349—352; 3 Not. 1988.

(*f*) *Re Horn*, 29 L. T. N. S. 830.

(*g*) *Beioley* v. *Carter*, L. R. 4 Ch. 230—237; 2 Not. 1691, 1640.

(*h*) *Re Shepheard*, L. R. 8 Eq. 571.

(*i*) *Collett* v. *Collett*, L. R. 2 Eq. 203; 1 Not. 5050.

(*k*) *Re Goodwin*, 3 Giff. 620; 1 Not. 988.

(*l*) *Ibid.*

(*m*) *Re Williams*, 20 W. R. 967.

(*n*) *Re Adair*, L. R. 16 Eq. 124; 3 Not. 696.

40 & 41 Vict. c. 18, § 2.

Time of settlement taking effect governs question whether estates are "settled."

1 Wm. IV. c. 65, § 17.

As to leases of infants' estates.

[s] That is, as distinguished from the state of things when an application is made to the Court. See the corresponding section of the Act of 1864 (*o*), and remarks of STUART, V.-C., in *Re Goodwin* (*p*).

Before 1864 it had been held that where a prior particular estate had determined, and the estate had become vested in fee simple in possession, in several persons it had ceased to be "settled," and the Court had no jurisdiction to order a sale under the Act of 1856, although some of the persons entitled might be infants (*q*). A lease could, under such circumstances, be authorised under 1 Wm. IV. c. 65, s. 17, if all parties interested were before the Court (*r*).

Sect. 17 of 1 Wm. IV. c. 65 is as follows:—

"Where any person being an infant under the age of twenty-one years is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant or his guardian, in the name of such infant, by the direction of the Court of Chancery to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct."

Probably, however, the Court would now consider that such a case falls within the Settled Estates Act, 1877 (*s*).

MEANING OF "THE COURT."

40 & 41 Vict. c. 18, § 3.

Interpretation of "the Court."

3. The expression "the Court" in this Act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this Act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of

(*o*) 27 & 28 Vict. c. 45, s. 3.

(*p*) 3 Giff. 620—628; 1 Not. 988.

(*q*) *Re Bardin*, 7 W. R. 711; 5 Jur. N. S. 1378; *Re Birtle*, 11 W. R. 739; 1 Not. 738.

(*r*) *Re Clark*, L. R. 1 Ch. 292.

(*s*) See *Re Williams*, 20 W. R. 967.

40 & 41 Vict. c. 18, § 3.

Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.[1]

The expression "the Court" in this Act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.[2]

[1] This section is new, and it has the effect of shortening several subsequent sections by the omission of words describing the Courts in England and Ireland respectively.

[2] Now the Chancery Division of the High Court of Justice in Ireland (*t*).

COURT MAY AUTHORISE LEASES.

40 & 41 Vict. c. 18. § 4.

Power to authorise leases of settled estates.

4. It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:[1]

Condition I.

Terms for which leases may be authorised.

First.[2] Every such lease shall be made to take effect in possession[3] at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England, twenty-one years, or so far as relates to estates in Ireland thirty-five years,[4] and for a mining lease[5] or a lease of water mills, way

(*t*) 40 & 41 Vict. c. 57, ss. 21 and 36.

leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term[6] than the term hereinbefore specified in that behalf: 40 & 41 Vict. c. 18, § 4.

Secondly.[7] On every such lease shall be reserved the best rent[8] or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent[9] or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease: Condition II. — Best rent to be reserved.

Thirdly.[10] Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned,[11] namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be Condition III. — Investment of part of rent of mineral leases.

40 & 41 Vict. c. 18, § 4

made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Condition IV. — Timber not to be felled.

Fourthly.[10] No such lease shall authorise the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Condition V. — Leases to be by deed with power of re-entry.

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days[12] after it becomes due, or for some less period to be specified in that behalf.

[1] The first paragraph of this section is a re-enactment of the corresponding part of sect. 2 of the Act of 1856, with the omission of words defining "the Court."

An application for an order authorising a lease must be made by petition (*u*). As to the mode in which leases may be authorised, see sect. 10, *infra*.

[2] This sub-section re-enacts in a consolidated form the provisions of the corresponding sub-section of sect. 2 of the Act of 1856, and sects. 2 and 4 of the Act of 1858, with slight alterations.

Possession.

[3] See *Re Ford* (*v*), cited under sect. 7, *infra*.

Occupation leases in Ireland.

[4] Under the Act of 1856 the time for which agricultural and occupation leases could be authorised was the same in Ireland as in England, viz., twenty-one years.

Mining lease.

[5] Where a mining lease was authorised the order included "so much land as the trustees shall consider necessary for the convenient and effective working of the minerals" (*x*). For a special order authorising a mining lease for forty years, see *Re Boyd* (*y*).

[6] The trustees of a charity were authorised to grant building leases for 600 years (*z*). And an order authorising a building lease for a term of 999 years at a fee farm rent was made, on evidence

(*u*) Sect. 23, *infra*.
(*v*) L. R. 8 Eq. 309; 2 Not. 2004.
(*x*) *Re Reveley*, 11 W. R. 744; 1 Not. 739.
(*y*) I. R. 8 Eq. 76.
(*z*) *Re Cross*, 27 B. 592.

being given that such was the invariable custom of the country, and that the property could not be beneficially disposed of for that purpose on any other terms (*a*). 40 & 41 Vict. c. 18, § 4.

[7] The first clause of this sub-section is a re-enactment of the corresponding sub-section in the Act of 1856. (2.)

[8] The "best rent" means the best terms which can reasonably be made for the benefit of the beneficiaries under the settlement. Therefore where an existing lease was surrendered (*b*) the value of the old lease was taken into account in fixing the rent under the new lease (*c*). Best rent.

[9] The latter part of this sub-section is new. Where a testator had entered into contracts for granting building leases with provisions for apportioning the ground rents among the houses in such a manner that some would be held at a peppercorn rent, it was doubted in 1861 whether the Act of 1856 applied, and a private Act of Parliament was considered necessary to authorise the trustees of the will to carry out such contracts (*d*).

[10] Sub-sects. 3 and 4 are *verbatim* re-enactments of provisions in the Act of 1856.

[11] See sects. 34—36, *infra*, p. 188—192, as to investment.

[12] In the corresponding sub-section in the Act of 1856 this period was "*not less than* twenty-eight days."

LEASES—SPECIAL COVENANTS.

5. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.[1] 40 & 41 Vict. c. 18, § 5. Leases may contain special covenants.

[1] This is a *verbatim* re-enactment of sect. 3 of the Act of 1856.

LEASES—PARTS OF ESTATES.

6. The power to authorise leases conferred by this Act shall extend to authorise leases either of the whole or any 40 & 41 Vict. c. 18, § 6.

(*a*) *Re Carr*, 9 W. R. 776.
(*b*) See sect. 7, *infra*.
(*c*) *Re Rawlins*, L. R. 1 Eq. 286.
(*d*) *Cust* v. *Middleton*, 3 D. F. J. 33.

40 & 41 Vict. c. 18, § 6. parts of the settled estates, and may be exercised from time to time.[1]

Parts of settled estates may be leased.

[1] This is a *verbatim* re-enactment of sect. 4 of the Act of 1856.

LEASES—SURRENDER.

40 & 41 Vict. c. 18, § 7. **7.** Any leases, whether granted in pursuance of this Act or otherwise, may be surrendered either for the purpose of obtaining a renewal of the same or not, and the power to authorise leases conferred by this Act shall extend to authorise new leases of the whole or any part of the hereditaments comprised in any surrendered lease.[1]

Leases may be surrendered and renewed.

[1] This section merely consolidates the provisions contained in sect. 5 of the Act of 1856 and sect. 5 of the Act of 1858.

Where an old lease is surrendered under this section and a new one granted, the latter takes effect in possession, although an existing underlease may not have been surrendered; and the term of the underlease continues as if the lease had not been surrendered (*e*). As to the effect of a surrender on the rent under a new lease see *Re Rawlins*, cited under sect. 4 (1).

LEASES—PRELIMINARY CONTRACTS.

40 & 41 Vict. c. 18, § 8. **8.** The power to authorise leases conferred by this Act shall extend to authorise preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases.[1]

Power to authorise leases to extend to preliminary contracts.

[1] This is a *verbatim* re-enactment of sect. 6 of the Act of 1856.

(*e*) *Re Ford*, L. R. 8 Eq. 309; 2 Not. 2004.

LEASES—SETTLED MANORS.

40 & 41 Vict. c. 18, § 9.

9. All the powers to authorise and to grant leases contained in this Act shall be deemed to include respectively powers to authorise the lords of settled manors[1] and powers to the lords of settled manors to give licenses to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this Act.

Powers of leasing to include powers to lords of settled manors to give licenses to their copyhold or customary tenants to grant leases.

[1] This section contains provisions similar to those of sect. 3 of the Act of 1858, with the addition of a power to the Court "to authorise the lords of settled manors" to give licenses, which had probably been accidentally omitted in the earlier enactment.

LEASES—HOW AUTHORISED.

40 & 41 Vict. c. 18, § 10.

10.[1] The power to authorise leases conferred by this Act may be exercised by the Court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned.[2]

Mode in which leases may be authorised.

[1] This is a *verbatim* re-enactment of sect. 7 of the Act of 1856.

[2] See sect. 13, *infra*, p. 168.

LEASES—EVIDENCE ON APPLICATION.

40 & 41 Vict. c. 18, § 11.

11. When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant

40 & 41 Vict. c. 18, § 11.

What evidence to be produced on an application to authorise leases.

to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.[1]

[1] This is a *verbatim* re-enactment of sect. 8 of the Act of 1856.

LEASES—COURT MAY APPOINT LESSOR.

40 & 41 Vict. c. 18, § 12.

After approval of a lease, Court to direct who shall be the lessor.

12. When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.[1]

[1] This is a *verbatim* re-enactment of sect. 9 of the Act of 1856.

LEASES—VESTING POWERS IN TRUSTEES.

40 & 41 Vict. c. 18, § 13.

Powers of leasing may be vested in trustees.

13.[1] Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees,[2] it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as

to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid. 40 & 41 Vict. c. 18, § 13.

[1] This is a *verbatim* re-enactment of sect. 10 of the Act of 1856, and the following cases under that section are therefore applicable to the present.

[2] On a petition by the assignee of a tenant for life, where some of the remaindermen were not *in esse*, the Court refused to vest general powers of leasing in the trustees, but authorised a particular lease (*f*).

General powers to grant mining leases have been vested in trustees under the corresponding section of the Act of 1856 (*g*). Also powers to grant building leases for 600 (*h*) and 999 years (*i*). But where a settlement contained powers of leasing with the consent of a specified person, the Court refused to vest in the trustees powers exercisable without such consent (*k*).

Where the Court had vested general powers of leasing in the trustees of two adjoining estates held upon separate trusts for distinct *cestuis que trustent*, such powers were held not to authorise a single mining lease of both properties at an entire rent. An agreement for such a lease was held to constitute a breach of trust, and an action to enforce specific performance of it was dismissed (*l*).

See *Cust* v. *Middleton*, cited under sect. 4, *ante*.

LEASES—SETTLEMENT BY COURT.

14.[1] Provided always, that in orders under this Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the 40 & 41 Vict. c. 18, § 14.

(*f*) *Re Hutchinson*, 12 Jur. N. S. 244.

(*g*) *Re Dorning*, 14 W. R. 125; 2 Not. 4666; *Tolson* v. *Sheard*, 5 Ch. D. 19; 4 Not. 826.

(*h*) *Re Cross*, 27 B. 592.

(*i*) *Re Hoyle*. 12 W. R. 1124.

(*k*) *Re Hurle*, 2 H. & M. 196; 1 Not. 3541, 3542.

(*l*) *Tolson* v. *Sheard*, 5 Ch. D. 19; 4 Not. 826.

40 & 41 Vict. c. 18, § 14.

Conditions that leases be settled by the Court not to be inserted in orders made under this Act.

leases thereby authorised should be submitted to or be settled by the Court or a judge thereof,[2] or be made conformable with a model lease deposited in the judge's chambers,[3] save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

[1] This is a re-enactment of sect. 1 of the Act of 1864, with merely verbal alterations to render it applicable to "this Act" instead of to sect. 10 of the Act of 1856.

[2] When powers of leasing were vested in trustees prior to the Act of 1864, the usual course was to order all leases to be settled in chambers (*m*), but not necessarily by conveyancing counsel (*n*).

Settling leases in chambers.

[3] Where, however, building leases of plots for small houses were authorised, a model lease was deposited in chambers (*o*). And when the leases were of cottages on a large estate, for which a printed form of lease was used, settlement in chambers was dispensed with (*p*).

Since 1864 it has not been thought necessary to have even mining leases settled in chambers (*q*).

As to settling conveyances in chambers on a sale under this Act, see *Re Eyre* (*r*).

40 & 41 Vict. c. 18, § 15.

Conditions where inserted may be struck out.

15.[1] Provided also, that in all cases of orders (whether under this Act or under the corresponding enactment of the Acts hereby repealed)[2] in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition,[3] and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it

(*m*) *Re Chambers*, 28 B. 653.
(*n*) *Re Jones*, 5 Jur. N. S. 138; *Re Procter*, 3 Jur. N. S. 534.
(*o*) *Re Hemingway*, 7 W. R. 279. Compare *A.-G.* v. *Christchurch*, 3 Giff. 514.
(*p*) *Re Earl of Jersey*, 9 W. R. 609.
(*q*) *Re Dorning*, 14 W. R. 125; 1 Not. 4666.
(*r*) 4 K & J. 268.

obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

40 & 41 Vict. c. 18, § 15.

[1] This section corresponds with sect. 2 of the Act of 1864, which applied only to orders made under sect. 10 of the Act of 1856.

[2] This section, it will be observed, applies to orders under the previous Acts as well as under that of 1877.

[3] The power of striking out the condition requiring leases to be settled in chambers has been exercised in a case where an order was made before the passing of the Act of 1864 (*s*), and also in a case where a petition was presented before, and an order made after, the passing of the last-mentioned Act (*t*).

COURT MAY AUTHORISE SALES.

16. It shall be lawful for the Court,[1] if it shall deem it proper and consistent with a due regard for the interests[2] of all parties entitled[3] under the settlement, and subject to the provisions and restrictions[4] in this Act contained, from time to time to authorise a sale[5] of the whole or any parts[6] of any settled estates,[7] or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.

40 & 41 Vict. c. 18, § 16.

Court may authorise sales of settled estates and of timber.

[1] This section differs from sect. 11 of the Act of 1856 only in omitting the definition of the word "Court," which is supplied by sect. 3 (*u*).

[2] Even where all parties interested concurred, the Court refused, in 1866, to make an order for a sale by private contract without a

(*s*) *Re Hoyle*, 12 W. R. 1124.
(*t*) *Re Russell*, 22 W. R. 399.
(*u*) P. 161, *ante*.

40 & 41 Vict. c. 18, § 16.

reference to chambers to ascertain whether such sale was for the benefit of the persons interested (*v*). But now, where the evidence shows that a sale will be beneficial, the usual course is to make an order on the hearing of the petition. See Cons. Ord. XLI., r. 22, cited under sect. 23, *infra*.

Persons entitled.

[3] "Parties entitled" means persons beneficially entitled; and trustees can only consent to a sale on behalf of unborn children (*w*).

Restrictions.

[4] The Court cannot authorise a sale if the settlement contains an express declaration to the contrary (*x*); but the fact that the settlement contains a power of sale does not restrict the power of the Court (*y*).

"A sale."

[5] The Court will not confer general powers of sale, but will only authorise such particular sales as are proved to be beneficial (*z*).

[6] Minerals may be sold apart from the surface (*a*), and on such a sale a rent-charge may be reserved in respect of surface damage (*b*). See sect. 19, *infra*.

Settled estates.

[7] What the Court is authorised to sell is the interest comprised in the settlement; but if a particular estate is settled, and the trustees of the reversion have a power of sale, the fee simple in possession may be sold (*c*).

PROCEEDINGS FOR PROTECTION.

40 & 41 Vict. c. 18, § 17.

17.[1] It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid

Proceedings for protection.

(*v*) *Re Hilton*, 14 L. T. N. S. 129.
(*w*) *Grey* v. *Jenkins*, 26 B. 351—6.
(*x*) Sect. 38, *infra*, p. 193.
(*y*) *Ibid*; *Re Thompson*, Joh. 418—423.
(*z*) *Re Peacock*, 15 W. R. 100.
(*a*) *Re Mallin*, 3 Giff. 126; *Re Law*, 7 Jur. N. S. 511.
(*b*) *Re Milward*, L. R. 6 Eq. 248; 2 Not. 1113.
(*c*) *Grey* v. *Jenkins*, 26 B. 351—6.

out of the rents and profits of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income. 40 & 41 Vict. c. 18, § 17.

[1] This section is new and has not yet been the subject of judicial interpretation.

SALES—FEE FARM RENT.

18.[1] When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve. 40 & 41 Vict. c. 18, § 18. Consideration for land sold for building may be a fee farm rent.

[1] This is a *verbatim* re-enactment of sect. 12 of the Act of 1856.

SALES—RESERVATION OF MINERALS.

19.[1] On any sale of land any earth, coal, stone, or mineral may be excepted,[2] and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable. 40 & 41 Vict. c. 18, § 19. Minerals, &c., may be excepted from sales.

[1] This is a *verbatim* re-enactment of sect. 13 of the Act of 1856.

[2] See note 6 to sect. 16 (*d*).

(*d*) *Ante*, p. 172.

LAYING OUT ROADS, STREETS, &c.

40 & 41 Vict. c. 18, § 20.

Court may authorise dedication of any part of settled estates for streets, roads, and other works.

20. It shall be lawful for the Court,[1] if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out[2] for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

[1] This section corresponds with sect. 14 of the Act of 1856, but omits the definition of the word "Court" which that section contained. See sect. 3 (*e*).

[2] General powers may be vested in trustees under this section, and the plans of the land proposed to be laid out need not be submitted to the Court on each exercise of the power (*f*).

40 & 41 Vict. c. 18, § 21.

As to laying out and making and executing and maintaining streets, roads, and other works, and expenses thereof.

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid,[1] the Court may direct that any such streets, roads, paths, squares, gardens or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof,[2] or out of any

(*e*) *Ante*, p. 161. (*f*) *Re Hargreaves*, 15 W. R. 54.

40 & 41 Vict. c. 18, § 21.

moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates,[3] or out of the income of such moneys or investments, or out of any accumulations of rents, profits or income; and the Court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the Court shall seem advisable.[4]

[1] This section is founded on sect. 1 of the Act of 1876. The words "for such purposes as aforesaid" are substituted for a repetition of the particular works which may be authorised.

[2] The words "or be raised and paid out of the rents and profits of the settled estates or any part thereof" are new.

[3] From this point to the end, the section is new.

[4] Prior to 1876 it had been held that notwithstanding the authority to direct the laying out of land for the works mentioned in sect. 14 of the Act of 1856 (see sect. 20, *ante*) the Court had no power to order such works to be carried out (*g*), or to direct the costs of such works to be raised by a sale of a portion of the estate (*h*). But in one case leases which stipulated that the lessees should make roads were authorised (*i*).

SALES—CONVEYANCE.

40 & 41 Vict. c. 18, § 22.

How sales and dedications are to be effected under the direction of the Court.

22.[1] On every sale or dedication to be effected as hereinbefore mentioned the Court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.[2]

(*g*) *Re Venour*, 2 Ch. D. 522.
(*h*) *Ibid*; *Re Hurle*, 2 H. & N. 196—203.
(*i*) *Re Chambers*, 28 B. 653.

40 & 41 Vict. c. 18, § 22.

[1] This is a *verbatim* re-enactment of the provisions contained in sect. 15 of the Act of 1856. Compare sect. 40 and notes thereto, p. 194, *infra*.

[2] An order for sale was made, and certain trustees were directed to convey, which they did. The legal estate was then outstanding in a mortgagee, and was subsequently reconveyed to other trustees. WOOD, V.-C., held that the legal estate was bound by the order for sale and passed to the purchaser, who was not entitled to any further assurance (*g*).

Where one of two trustees, who had been ordered to convey, died before completion, BACON, V.-C., directed a petition for the appointment of a new trustee to be presented (*h*). The conveyance must be settled by the judge, whether the parties differ or not; but when a large estate is sold in lots a model conveyance may be adopted (*i*).

WHO MAY PETITION.

40 & 41 Vict. c. 18, § 23.

Application by petition to exercise powers conferred by this Act.

23.[1] Any person entitled to the possession or to the receipt[2] of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life,[3] or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life, or any greater estate, may apply to the Court by petition[4] in a summary way to exercise the powers conferred by this Act.

[1] This is a re-enactment, with considerable amendments, of sect. 16 of the Act of 1856. By that section the right to petition was limited to "any person entitled to the receipt," &c., "for a term of years determinable on his death, or for an estate for life, or any greater estate." Now it is extended to the assignee of a tenant either for life or *pur autre vie*, or any greater estate. Singularly enough it does not apply, as does sect. 46, *infra*, to a tenant "for any life," so as to include the case of a tenant *pur autre vie*, who is not an assignee.

(*g*) *Eyre* v. *Saunders*, 5 Jur. N. S. 703.

(*h*) *Scott* v. *Heisch*, 24 W. R. 108.

(*i*) *Re Eyre*, 2 K. & J. 268.

40 & 41 Vict. c. 18, § 23.

[s] A testator gave his own and his late father's residuary estate to trustees upon trusts, under which, as to two-fifths, the income was payable to his widow for life; and as to the other three-fifths, the income was to be applied in payment of the ground rents, taxes, insurance and other expenses of management in respect of the entirety, and the nett residue of such income was also to be paid to his widow for life. The trustees had large powers of management, but there was no power to grant leases. It was held by JESSEL, M. R., that the widow did not come within the definition of a person entitled to petition contained in sect. 16 of the Act of 1856; and this decision was affirmed on appeal (*k*). The case had previously been before the Master of the Rolls on another point (*l*); and there are some observations in his judgment which seem to imply a doubt whether an equitable tenant for life could, in any case, petition. The following remarks were, however, made by JAMES, L. J.: "The Master of the Rolls has not decided anything on the general construction of the Act, but he has decided that, having regard to the very peculiar construction of this will and to the peculiar mode in which the rent and profits of part of the property are to be applied in repairing the whole, it is in this case impossible to authorise leases." It should also be observed that the petition was opposed by a remainderman whose concurrence was held, in both Courts, to be necessary.

The provision in section 46, allowing a person entitled to the receipt of rents "for any life" to grant leases, may possibly be construed to imply that where there is an equitable tenant for life the trustees can exercise the power. But sect. 23 does not contain similar words applicable to cases where a petition is necessary. As to petitions by infants, lunatics, and persons of unsound mind, see pp. 201—3, *infra*.

[t] In one case under the Act of 1856, an order was made on the petition of the assignee of a tenant for life, although such a person did not come strictly within the definition in that Act (*m*).

In 1868 a petition was presented by a tenant for life, subject to a term; and leave to amend by making the trustees of the term co-petitioners was given and an order made (*n*).

An order was made in 1861, on the petition of a widow and her children, where the property was limited to the widow during widowhood with remainder to the children (*o*). And generally, where all persons interested in the property are before the Court and consent, an order will be made (*p*).

(*k*) *Taylor* v. *Taylor*, 1 Ch. D. 426; 3 Ch. D. 145.
(*l*). L. R. 20 Eq. 297—303-4.
(*m*) *Re Hutchinson*, 14 W. R. 473.
(*n*) *Ex p. Puxley*, I. R. 2 Eq. 237.
(*o*) *Williams* v. *Williams*, 9 W. R. 888.
(*p*) *Re Williams*, 20 W. R. 967.

40 & 41 Vict. c. 18 § 23.

[4] *Semble* that an order can only be made on petition (*q*). No other process can be adopted. *Per* JESSEL, M. R. (*r*). Compare the observations of FRY, J. and HALL, V.-C., in recent cases (*s*) under the Trustee Relief Act.

Every petition must set forth the name, address and description of the petitioner, and also an address for service within two miles from the Record and Writ Clerks' Office (*t*).

All petitions, notices, affidavits and other proceedings must also be entitled in the matter of the Act and of the property, mentioning the county and parish or place where it is situated, and describing it in general terms. Every petition must also be marked with the name of judge before whom it is to be heard (*u*). The property need only be described in such a way as to make the matter intelligible to the Court (*v*).

Every petition for a sale must be supported by evidence as to the persons interested whose consent is necessary, and the circumstances which render the sale expedient (*w*).

CONSENTS TO APPLICATIONS.

40 & 41 Vict. c. 18, § 24.

24. Subject to the exceptions hereinafter[1] contained, every application[2] to the Court must[3] be made with the concurrence or consent of the following parties,[4] namely,

With whose consent such application to be made.

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail;

(*q*) *Harvey* v. *Clark*, 25 B. 7.
(*r*) *Taylor* v. *Taylor*, 1 Ch. D. 426, 431.
(*s*) *Pelling* v. *Goddard*, 26 W. R. 476; *Re Puttrell's Trusts*, 7 Ch. D. 647.
(*t*) Cons. Ord. XLI. r. 14.
(*u*) Cons. Ord. XLI. r. 15.
(*v*) *Re Burnley*, 23 W. R. 546; *Re Thompson*, Joh. 418.
(*w*) Cons. Ord. XLI. r. 22.

40 & 41 Vict. c. 18, § 24.

> And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

[1] This section is a re-enactment of the provisions of sect. 17 of the Act of 1856, with the substitution of the word "hereinafter" for "in the next section."

[2] This section does not apply to applications under s. 37 (*x*).

[3] In 1867 it was held that the Court had no discretion to make an order if any person whose consent was necessary opposed it (*y*). And where a testator by his will made the consent of his widow necessary, the Court, in 1864, refused to make an order on a petition opposed by her (*z*).

[4] But the Court now has much larger powers of dispensing with consents than formerly. The following is a summary of the existing provisions on the subject :—

Summary of provisions as to consents.

Subject to the exceptions mentioned below, all persons in existence, and all trustees for unborn persons, having any beneficial interest must consent (*a*). But if there is a tenant-in-tail in existence, no persons having interests subsequent to him need concur if he is *sui juris* (*b*), and the Court may, in its absolute discretion, dispense with the consent of such persons if the tenant-in-tail is an infant (*c*).

In any other case the Court may dispense with the consent of any person, having regard to the number and interests of the persons assenting and dissenting respectively (*d*).

Or an order may be made without the consent, but subject to the rights of any person whose consent the Court does not think fit to dispense with (*e*). This provision did not, formerly, apply, as it now does, to a person entitled to an estate of inheritance.

Where the Court does not, in the first instance, think fit to dispense with the consent of any person, it may direct him to be served with a notice requiring him to state, within a specified time, whether he consents, dissents, or submits his interests to the Court; and if he omits to do so, he is to be deemed to have submitted (*f*).

The Court may, however, dispense with the service of such a notice in the following cases :—

(*a*) If the person cannot be found.

(*x*) *Re Cleveland*, 2 Dr. & S. 481.
(*y*) *Re Merry*, 15 W. R. 307.
(*z*) *Re Hurle*, 2 H. & M. 196.
(*a*) Sect. 24.
(*b*) Sect. 24.
(*c*) Sect. 25.
(*d*) Sect. 28.
(*e*) Sect. 29.
(*f*) Sect. 26.

40 & 41 Vict. c. 18, § 24.

(β) If it is uncertain whether he is living or dead.

(γ) If the expense of service would be disproportionate to the value of the property.

The person on whom service is so dispensed with, is to be deemed to have submitted his interests to the Court (*g*).

See also the last sentence of sect. 30 (p. 184) as to service, which gives the Court an implied power to dispense with service when it thinks fit.

In 1866 an order authorizing a lease was made, notwithstanding the opposition of tenants for life in remainder (*h*). And in other early cases service on persons of unsound mind not so found (*i*), who had small interests, was dispensed with; and it was decided that trustees who had power to give receipts could concur on behalf of their *cestuis que trustent*, who were beneficially interested in the purchase money (*j*).

Trustees can only consent for unborn or unascertained persons.

But these decisions were subsequently overruled; and it was even held that the consent of persons beneficially interested in a term for raising portions was necessary (*k*). And in another case, where real estate was devised to A., B., and C. successively for life, and after the death of the survivor to X., upon trust to sell and divide the proceeds among twenty-five persons, it was held that the consent of all the persons beneficially interested in the proceeds was necessary, as a trustee can only consent on behalf of unborn persons (*l*). So where a testator gave real estate upon trust for his daughter A. for life, with remainder to her children, as she should appoint, and in default upon trusts for the survivor of his daughters, B. and C., it was held on a petition by A. that the trustees of the will could not consent on behalf of the infant children of C., who had married and settled her share (*m*). But where real estate was given to trustees upon trust for A. for life, with remainder as she should appoint, and in default in trust for such person as she should leave her heir, an objection that the Court had no jurisdiction on a petition by A. to make an order binding on the heir of A. was overruled, on the ground that he could not be ascertained during her life. In that case SELWYN, L. J., remarked—"A person whose consent is to be obtained must be one whose consent is capable of being obtained, not one who is not in existence (*n*)."

So also where real estate was given to trustees, subject to the life

(*g*) Sect. 27.
(*h*) *Re Hutchinson*, 14 W. R. 473.
(*i*) *Re Turbutt*, 2 N. R. 158; *Re Franklin*, 7 W. R. 45.
(*j*) *Eyre* v. *Saunders*, 4 Jur. N. S. 330; *Re Potts*, L. R. 16 Eq. 631 n. Compare *Grey* v. *Jenkins*, 26 B. 351.
(*k*) *Re Boughton*, 12 W. R. 34.
(*l*) *Re Ives*, 3 Ch. D. 690.
(*m*) *Re Dendy*, 4 Ch. D. 879.
(*n*) *Beioley* v. *Carter*, L. R. 4 Ch. 230—238.

estates of A. and her husband, upon trust to sell and hold the proceeds upon trust for all the children of A. who should be living at the death of the survivor of the testator, and A. and her husband, and the issue of such as should be then dead, it was held, on the petition of A., her husband, and five of their children, that the consent of the infant children of the other child (who consented) was not necessary, as they belonged to a class the members of which could not then be ascertained (*o*).

40 & 41 Vict. c. 18, § 24.

See also cases cited under sects. 26, 28, and 29, *infra*.

25.[1] Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the Court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

40 & 41 Vict. c. 18, § 25.

Court may dispense with consent in respect of certain estates.

[1] This section is new. See note 2 to sect. 24, *ante*.

26.[1] Provided always, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given[2] to such person in such manner[3] as the Court to which the application shall be made shall direct, requiring him to notify, within a time to be specified in such notice,[4] whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice, and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.

40 & 41 Vict. c. 18, § 26.

Notice to be given to persons who do not consent to or concur in the application.

(*o*) *Re Strutt*, L. R. 16 Eq. 629. Compare *Re Chamberlain*, 23 W. R. 825.

40 & 41 Vict. c. 18, § 26.

[1] This is a re-enactment of the provisions of sect. 2 of the Act of 1876, with slight verbal alterations to adapt them to the consolidated Act.

[2] Notice has been ordered to be given to remaindermen who were *sui juris* (*p*) to persons of unsound mind not so found, and the persons who had charge of them (*q*), and to a married woman residing in New Zealand, whose interest was very small (*r*). And where a married woman, who was entitled to real estate contingently on surviving her two sisters, settled her share on trusts for the benefit of herself and her husband for life with remainder to her children, notice of a petition by her was ordered to be served on the children (*s*).

[3] In the last case the notice was given by serving the petition on the father of the infants (*t*). In another case notice to a person residing in New Zealand was sent by registered letter (*u*).

[4] Ten days was the time limited in a recent case (*x*).

40 & 41 Vict. c. 18, § 27.

Court may dispense with notice under certain circumstances.

27.[1] Provided also, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the Court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject matter of the application, then and in any such case the Court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the Court.

[1] This section is new, and it was probably introduced in consequence of a recent decision to the effect that the consent of a married

(*p*) *Re Chamberlain*, 23 W. R. 852.
(*q*) *Re Crabtree*, L. R. 10 Ch. 201.
(*r*) *Re Rylar*, 24 W. R. 949. Compare *Re Mewburn*, 24 W. R. 752.
(*s*) *Re Dendy*, 4 Ch. D. 879.
(*t*) *Ibid.*
(*u*) *Re Rylar*, 24 W. R. 949.
(*x*) *Re Dendy*, 4 Ch. D. 879.

woman, whose interest was very small and who lived in New Zealand, could not be dispensed with under sect. 3 of the Act of 1874 (sect. 28 of the Act of 1877) unless she had been served with notice under the preceding section. 40 & 41 Vict. c. 18, § 27.

Compare the last sentence of sect. 30, *infra* p. 184, and see cases cited thereunder. See also *Re Cundee*, W. N. (1877) 184.

28.[1] An order may be made upon any application, notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made[2]; and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto. 40 & 41 Vict. c. 18, § 28. Court may dispense with consent, having regard to the number and interests of parties.

[1] This section is a re-enactment of the provisions of sect. 3 of the Act of 1874, with a slight verbal alteration.

[2] Where a person aged sixty-one was entitled to the rents and profits, and the reversion in fee was limited (in the events which had happened) to the survivor of the tenant for life, and X., whose age was forty-eight, the Court refused, on a petition by the tenant for life, to make an order, which was opposed by X.; and this decision was affirmed on appeal (*y*).

See *Re Rylar*, cited under sect. 26, and *Re Hurle*, cited under sect. 24, *ante*.

29.[1] Provided nevertheless, that it shall be lawful for the Court, if it shall think fit, to give effect to any petition subject to, and so as not to affect the rights, estate, or interest of, any person[2] whose concurrence or 40 & 41 Vict. c. 18, § 29. Petition may be

(*y*) *Taylor* v. *Taylor*, 1 Ch. D. 426, 3 Ch. D. 145.

40 & 41 Vict. c. 18, § 29.

consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the Court,[2] or whose rights, estate, or interest ought in the opinion of the Court to be excepted.

granted without consent, saving rights of non-consenting parties.

[1] This is a re-enactment, with amendments, of sect. 18 of the Act of 1856.

[2] The old section expressly excepted the case of a person entitled to an estate of inheritance whose consent was refused, or could not be obtained; and applied generally to the case of persons whose consent could not be obtained, instead of to those who have not submitted their interests to the Court.

Under sect. 18 of the Act of 1856, orders were made subject to the rights of pecuniary legatees (*z*), especially where they were very numerous, and there was great difficulty in serving them all (*a*). Such cases would, probably, now be dealt with under sect. 27 or sect. 28.

SERVICE OF PETITION.

40 & 41 Vict. c. 18, § 30.

30.[1] Notice of any application[2] to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties[3] who, in the opinion of the Court, ought to be so served,[4] unless the Court shall think fit to dispense with such notice.[5]

Notice of application to be served on all trustees, &c.

[1] This is a *verbatim* re-enactment of the provisions of sect. 19 of the Act of 1856.

[2] Notice is given by serving a copy of the petition.

[3] *Semble* that the petition must be served on all persons in existence having any interest, down to the first tenant-in-tail (*b*). If, however, it is intended to ask the Court to dispense with the consent of any persons, under sect. 28 or 29, such persons need not be served in the first instance; but the Court has power, under sect. 26, to direct notice to be served on them.

(*z*) *Re Parry*, 34 B. 462.
(*a*) *Re Legge*, 6 W. R. 20.
(*b*) *Re Bolton*, 19 W. R. 429.

40 & 41 Vict. c. 18, § 30.

[4] The petition must be served on such persons as the petitioner considers necessary, and must not be brought on merely to obtain the opinion of the Court as to service (*c*).

[5] In 1858, service of a petition on a married woman of unsound mind, not so found, who had only a remote contingent interest, was dispensed with. Other persons having similar interests had been served and consented to the application (*d*). Where infants had a remote contingent interest, the Court did not require them to be served (*e*).

See also sects. 27 and 28, *ante*.

ADVERTISEMENT OF PETITION.

40 & 41 Vict. c. 18, § 31.

Notice of application to be given in newspapers if Court direct.

31. Notice of any application to the Court under this Act shall, if the Court shall so direct, but not otherwise,[1] be inserted in such newspapers as the Court shall direct,[2] and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion[3] for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application,[4] on such terms as to costs or otherwise, and in such manner, as it shall think fit.

[1] This is a re-enactment of sect. 20 of the Act of 1856, with the important addition of the words, "*if the Court shall so direct, but not otherwise.*" Formerly the advertisement of a petition for a lease or sale was always necessary; but the rule did not apply to the case of an application for re-investment of purchase-money (*f*). In a case under the Act of 1877 (*g*), MALINS, V.-C., remarked that it would be a very extraordinary case which would induce him to require advertisements to be issued.

(*c*) *Re Green*, 4 Jur. N. S. 530.
(*d*) *Re Franklin*, 7 W. R. 45. Compare *Re Turbutt*, 2 N. R. 158, and cases cited under sect. 24, *ante*; and *Re De Tabley*, 11 W. R. 936.
(*e*) *Re Chamberlain*, 23 W. R. 852.
(*f*) *Re Sexton Barns*, 10 W. R. 416.
(*g*) *Re Chilcott*, W. N. (1877) 259.

40 & 41 Vict. c. 18, **§ 31.**

Former practice as to advertisements.

In 1865 it was held that the description of the property in the advertisements must correspond verbally with that in the title of the petition, and the omission of the words "in the parish of" and "now unoccupied" was held fatal to the validity of the advertisement (*i*). But more recently it has been held that a slight discrepancy is merely an irregularity that the Court may waive (*k*).

Accordingly where a petition presented by twenty-six petitioners was advertised as presented by "X. and others" (*l*), where the address of the petitioner's solicitor, but not of the petitioner himself, was stated (*m*), where the address of the next friend of a petitioner was omitted (*n*), and where a testator was described as "of Gotham, in the county of Middlesex," instead of "Gotham in the county of Nottingham" (*o*), the advertisements were considered sufficient.

If it became necessary to amend a petition after the issue of the advertisements, it was not always necessary, under the Act of 1856, to repeat the advertisements. It would depend upon the circumstances of the case (*p*). Fresh advertisements were dispensed with in the following cases:—

Where a female respondent married and settled her share (*q*); where an infant who took an interest in the property was born (*r*); where a petitioner (tenant for life) died, and the tenant in tail became petitioner (*s*). And where general powers of leasing had been vested in a tenant for life, who died, an order was made on the petition of the new tenant for life vesting similar powers in trustees, without any advertisements (*t*).

So, where an order had been made on a petition under the Act of 1856, and a petition for a confirmation of the order was presented under the Act of 1877, in consequence of the title and advertisements of the former petition having omitted to describe a portion of the property, no further advertisements were required (*u*).

[3] An application for directions as to advertisements may be made

(*i*) *Re Bateman*, 34 L. J. Ch. 320; 1 Not. 3682.

(*k*) *Re Bicknell*, L. R. 14 Eq. 467; 3 Not. 66.

(*l*) *Re Whiteley*, L. R. 8 Eq. 574; 2 Not. 2114.

(*m*) *Re Snell*, 19 W. R. 1000.

(*n*) *Re Burley*, 18 L. T. N. S. 458.

(*o*) *Re Hemsley*, L. R. 16 Eq. 315; 3 Not. 698.

(*p*) *Re Bunbury*, 11 Jur. N. S. 27; 1 Not. 3543. *Re Corbett*, 15 L T. N. S. 173. *Re Puxley*, L. R. 2 Eq. 237—245.

(*q*) *Re Wilkinson*, 21 W. R. 537. *Re Marshall*, L. R. 15 Eq. 66; 3 Not. 576.

(*r*) *Re Lewis*, 24 W. R. 103. *Re Horton*, 34 B. 386.

(*s*) *Re Wilkinson*, L. R. 9 Eq. 71; 2 Not. 2692.

(*t*) *Re Kentish Town*, 1 J. & H. 230. Compare *Wheeler* v. *Tootel*, 16 W. R. 273; 2 Not. 1519.

(*u*) *Re Earl Kilmorey*, 26 W. R. 54.

ex parte by summons at chambers after the petition is presented (*x*). This was the practice under the Act of 1856, but as advertisements are now rarely required, it is more usual to bring the petition on for hearing without making any such application, and then apply for the petition to stand over, in the event of the Court considering advertisements necessary.

40 & 41 Vict. c. 18, § 31.

Present practice as to advertisements.

Where the Court directed advertisements for three *successive* weeks, and the last appeared, by mistake, on a Monday instead of on the previous Saturday, the direction was held to have been sufficiently complied with (*y*).

Under the Act of 1856, a petition was not allowed to be set down for hearing until three weeks after the last advertisement (*z*); and Lord ROMILLY, M. R., refused to relax the rule even where the effect was to throw the petition over the long vacation (*a*). On the other hand, BACON, V.-C., was accustomed to allow a petition to be put in the paper on the last petition-day before the long vacation, although the three weeks might not have expired (*b*).

[3] Such a motion might, under the Act of 1856, be made within seven clear days after the last advertisement, but not later without special leave, and any order on such motion must be served on the petitioner within four days from the making thereof (*c*). After the expiration of the seven days, special leave was not given unless some reason or excuse for the delay was shown (*d*).

[4] A person obtaining leave to appear might serve with the order a written application and undertaking to pay for a copy of the petition (*e*); and the petitioner was bound to furnish the same within two days, on payment of fourpence per folio (*f*).

WHEN COURT MAY EXERCISE POWERS.

40 & 41 Vict. c. 18, § 32.

No application un-

32.[1] The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament[2] for a private Act to effect

(*x*) Cons. Ord. XLI., r. 16.
(*y*) *Re Monkton Farleigh*, 4 N. R. 221.
(*z*) Cons. Ord. XLI., r. 20.
(*a*) *Re Townsend*, L. R. 14. Eq. 433; 3 Not. 65.
(*b*) *Re Bower*, 18 W. R. 1085; *Re Taylor*, L. R. 14 Eq. 557; *Re Adam*, 6 L. T. N. S. 604.
(*c*) Cons. Ord. XLI., r. 17.
(*d*) *Re Merry*, 14 W. R. 665; 1 Not. 5684.
(*e*) Cons. Ord. XLI., r. 18.
(*f*) Cons. Ord. XLI., r. 19.

40 & 41 Vict. c. 18, § 32.

der this Act to be granted where a similar application has been rejected by Parliament.

the same or a similar object, and such application has been rejected on its merits,[3] or reported against by the judges to whom the bill may have been referred.

[1] This is a *verbatim* re-enactment of sect. 21 of the Act of 1856.

[2] The Court must be satisfied by "sufficient evidence" that no such application has been made and rejected, or reported against (*g*).

[3] Where such an application has been made and refused the Court will presume that it has been rejected on the merits unless it is shown to have been refused in consequence of some informality (*h*).

NOTICE OF ORDER.

40 & 41 Vict. c. 18, § 33.

Notice of the exercise of powers to be given as directed by the Court.

33.[1] The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof,[2] or otherwise recorded in any way it may think proper,[3] in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake.

[1] This is a *verbatim* re-enactment of sect. 22 of the Act of 1856.

[2] Every order made under the Act must specify on what document or documents (if any) the notice shall be placed, and the judge may require the production, in Court, of such document or documents, when indorsed, for his inspection (*i*).

[3] Where the order relates to land in a register county the Court may order a duplicate or memorial of the order to be registered (*k*).

SALES—REINVESTMENT.

40 & 41 Vict. c. 18, § 34.

Payment and application of

34.[1] All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve,[2]

(*g*) Cons. Ord. XLI., r. 21.
(*h*) *Re Wilson*, 1 L. T. N. S. 25.
(*i*) Cons. Ord. XLI., r. 24.
(*k*) *Ibid.*

40 & 41 Vict. c. 18, § 34.

moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

or otherwise the same, so far as relates to estates in England, shall be paid into Court *ex parte* the applicant in the matter of this Act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the Accountant-General *ex parte* the applicant in the matter of this Act; and such money shall be applied, as the Court shall from time to time direct, to some one or more of the following purposes, namely—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rent-charge in lieu of tithes, Crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid;[3] or

The payment to any person becoming absolutely entitled[4].

[1] This is a re-enactment, with some alteration, of the provisions of sect. 23 of the Act of 1856. By that section the money was ordered (if not paid to trustees) to be paid into the Bank of England or the Bank of Ireland as the case might be, and "in either case" to be applied as the Court should direct, &c.

In the Act of 1856 the provisions embodied in the first and second sub-sections of the above section were grouped together as the first sub-section, and no distinction was made between estates in England and Ireland, but the provision as to purchase or redemption of land-tax applied to both.

Payment of proceeds of sale to trustees.

[2] Where real estate was setted in trust for the separate use of a married woman for life, and after her death upon trust for sale and division of the proceeds, the purchase-money was paid to the trustees of the settlement to hold upon the trusts thereof (*l*), and in another case (*m*) it was paid to the trustees of a will.

(*l*) *Re Morgan*, L. R. 9 Eq. 587; 2 Not. 2691.

(*m*) *Re Hemsley*, 43 L. J. Ch. 72; 3 Not. 698.

40 & 41 Vict. c. 18, § 34.

[3] On a re-investment in land, where the original trustees were dead, new trustees were appointed, the petition being amended for that purpose (*n*).

The Court has jurisdiction to allow an investment on mortgage instead of purchase of real estate (*o*).

New buildings a reinvestment, but repair of old buildings not.

In 1869 STUART, V.-C., allowed purchase money to be invested in (*α*) new farm buildings, (*β*) the repair of old buildings, and (*γ*) the construction of roads and drains which were proved to be for the benefit of the estate (*p*); and in 1874 JAMES and MELLISH, L. JJ., sanctioned the investment of the proceeds of sale of timber in (*α*) building new hop kilns and granary, (*β*) the conversion of old hop kilns into cottages, (*γ*) various repairs and alterations on farms, and (*δ*) drainage works, all of which would permanently increase the value of the property (*q*). In a subsequent case (*r*), however, where trust money was by will directed to be laid out "in the purchase of lands, tenements, and hereditaments," to be conveyed to the uses declared by the will, JAMES, L. J., remarked :—"I think, therefore, that the cases in which moneys arising under the *Settled Estates Act* or the *Lands Clauses Act* have been applied in what is not strictly a purchase of land are authorities in point. . . . . We never intended, however, to go further than this—that the expending money in building a house on a vacant piece of ground forming part of the settled property is, in substance, the same thing as buying a house ; and that money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am, therefore, of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay on permanent improvements which do not put new buildings on the ground. But I consider that the proposed outlay in the erection of new farm-houses, cottages, and other buildings, whether in addition to those existing before, or in substitution for such as have become so ruinous that they must be taken down, is an allowable mode of applying the money, provided the judge be satisfied that it is beneficial to the estate" (*s*).

Roads and drains.

Accordingly, in 1876, it was held by JESSEL, M. R., that the construction of roads and drains was not an authorised mode of investment (*t*). But see now sect. 21, *ante*, p. 174, which authorises

(*n*) *Re Sexton Barns*, 10 W. R. 416.
(*o*) *Wall* v. *Hall*, 11 W. R. 298 ; 1 Not. 109.
(*p*) *Re Clitheroe*, 17 W. R. 345.
(*q*) *Re Newman*, L. R. 9 Ch. 681, 682 ; 3 Not. 1701.
(*r*) *Drake* v. *Trefusis*, L. R. 10 Ch. 364 ; 3 Not. 1794.
(*s*) *Ibid.*, 366, 367.
(*t*) *Re Venour*, 2 Ch. D. 522 ; 4 Not. 227.

such an application of "investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates." 40 & 41 Vict. c. 18, § 34.

"Absolutely entitled."

[4] Under the corresponding section of the *Lands Clauses Act*, trustees with a power of sale were held, by the Court of Appeal, to be "absolutely entitled" (*u*). On payment out to a tenant-in-tail there is a conflict of authority whether or not a disentailing deed is necessary (*v*). In one case, KINDERSLEY, V.-C., required not only a disentailing deed, but also an affidavit that there were no incumbrances (*x*). And in a recent case in lunacy the LORDS JUSTICES refused to order payment out of Court, of money representing a base fee, except upon production of a deed enlarging the base fee (*y*).

As to the application of the equitable doctrine of conversion to the proceeds of sale, on the death of a person entitled thereto, see cases cited under sect. 8 of the Partition Act, 1868 (*z*).

40 & 41 Vict. c. 18, § 35.

Trustees may apply moneys in certain cases without application to Court.

35.[1] The application of the money in manner aforesaid may, if the Court shall so direct, be made by the trustees[2] (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition[3] of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

[1] This section is a *verbatim* re-enactment of sect. 24 of the Act of 1856.

[2] The proceeds of sale have been ordered to be paid to the trustees (*a*).

[3] A petition under this section need not be advertised under sect. 31 (*b*), nor served upon all the persons mentioned in sect. 24, *ante* (*c*).

TEMPORARY INVESTMENT.

40 & 41 Vict. c. 18, § 36.

36.[1] Until the money can be applied as aforesaid, the same shall be invested[2] as the Court shall direct in some

(*u*) *Re Hobson*, 7 Ch. D. 708,
(*v*) *Re Wood*, L. R. 20 Eq. 372; 3 Not. 2264. *Re Broadwood*, 1 Ch. D. 438; 3 Not. 2265.
(*x*) *Thornhill* v. *Milbank*, 12 W. R. 523; 1 Not. 2267.
(*y*) *Re Reynolds*, 3 Ch. D. 61.
(*z*) P. 134, *ante*.
(*a*) *Re Peacock*, 15 W. R. 100.
(*b*) *Re Sexton Barns*, 10 W. R. 416.
(*c*) *Re Duke of Cleveland*, 1 Dr. & Sm. 481.

40 & 41 Vict. c. 18, § 36.

Until money can be applied to be invested, and dividends to be paid to parties entitled.

or one of the investments in which cash under the control of the Court is for the time being authorised to be invested,[3] and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

[1] This is an amended re-enactment of the provisions of sect. 25 of the Act of 1856, which mentioned exchequer bills and consols only as interim investments, and the question often arose whether or not this authorised an investment in any other mode in which "cash under the control of the Court" generally might be invested (*d*).

[2] An investment is not made without a written request by the solicitor of the person desiring the investment; and where no such request had been made, the Court refused to allow proceedings to be taken against the Accountant-General in respect of money that had remained uninvested for four years (*e*).

[3] "Cash under the control of the Court may be invested in bank stock, East India stock, exchequer bills, and 2*l.* 10*s.* per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in consolidated 3*l.* per cent. annuities, reduced 3*l.* per cent. annuities, and new 3*l.* per cent. annuities" (*f*).

INVESTMENT—LEASES AND REVERSIONS.

40 & 41 Vict. c. 18, § 37.

Court may direct application

37.[1] Where any purchase money paid into Court under the provisions of this Act shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent

(*d*) *Re Cook*, L. R. 12 Eq. 12. *Re Shaw*, L. R. 14 Eq. 9; 2 Not. 4630. *Re Boyd*, 21 W. R. 667. *Re Thorold*, L. R. 14 Eq. 31; 2 Not. 4630. *Re Taddy*, L. R. 16 Eq. 532; 3 Not. 908. Compare *Re Birmingham Blue Coat School*, L. R. 1 Eq. 632; 1 Not. 4928. *Re Broadwood*, 24 W. R. 108; 3 Not. 2265. *Langmead* v. *Cockerton*, 25 W. R. 315; 4 Not. 480.

(*e*) *Re Woodcock*, L. R. 13 Eq. 183; 1 Not. 4229.

(*f*) 23 & 24 Vict. c. 38, s. 10, and Rule 1 of Feb. 1861.

40 & 41 Vict. c. 18, § 37.

of money in respect of leases or reversions as may appear just.

on any such lease or estate, it shall be lawful for the Court, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

[1] This section is new.

POWERS OF COURT—GENERALLY.

40 & 41 Vict. c. 18, § 38.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

38.[1] The Court shall be at liberty to exercise any of the powers conferred on it by this Act, whether the Court shall have already exercised any of the powers conferred by this Act in respect of the same property or not; but no such powers shall be exercised if an express declaration[2] that they shall not be exercised is contained in the settlement:[3] Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

[1] This is a re-enactment, with amendments, of sect. 26 of the Act of 1856.

[2] The words "or manifest intention" were inserted here, in the Act of 1856. Where a testator recorded his "express desire" that a mansion house should not be let, the Court refused to authorise a lease, although of opinion that such a lease would clearly be for the benefit of the estate and all persons interested therein (*g*).

[3] The words "or may reasonably be inferred therefrom, or from extrinsic circumstances or evidence" which occurred here, have been omitted.

(*g*) *Re Cleveland*, 22 W. R. 818.

POWERS OF COURT—HOW LIMITED.

40 & 41 Vict. c. 18, § 39.

Court not to authorise any act which could not have been authorised by the settlor.

39. Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors.

This is a *verbatim* re-enactment of sect. 27 of the Act of 1856.

POWERS OF COURT—ACTS TO BE VALID.

40 & 41 Vict. c. 18, § 40.

Acts of the Court in professed pursuance of this Act not to be invalidated.

40. After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same,[3] except that no such lease, sale, or other act shall have any effect against[1] such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.[2]

[1] Down to this point, this section is a re-enactment of sect. 28 of the Act of 1856, but the latter concluded as follows: "any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained."

[2] See sects. 24 to 29 inclusive, and cases there cited.

[3] This section removes any objection which might be taken to the title by a subsequent purchaser, on the ground of irregularity in the proceedings under the Act (*h*).

"The effect of the 28th section (of the Act of 1856) is that it has no

(*h*) *Beioley* v. *Carter*, L. R. 4 Ch. 230—239; 2 Not. 1691.

operation if the order for sale was right, and if it was not right, any informality in it will not be allowed to interfere with the validity of the sale. *Per* GIFFARD, L. J. (*i*). A sale under the Act cannot be invalidated, except as against a person mentioned in this section (*k*). 40 & 41 Vict. c. 18, § 40.

A purchaser may raise any objection in respect of the proceedings after the order for sale and before completion; but after the execution of his conveyance his title is good (*l*). See sect. 22, *ante*, p. 175, and notes thereto.

POWERS OF COURT—COSTS.

41.[1] It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct. 40 & 41 Vict. c. 18, § 41. Costs.

[1] This is a *verbatim* re-enactment of sect. 29 of the Act of 1856.

RULES MAY BE MADE.

42.[1] General rules and orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and 40 & 41 Vict. c. 18, § 42. Rules and orders.

(*i*) L. R. 4 Ch. 242.
(*k*) *Re Shepheard*, L. R. 8 Eq. 571—573; 2 Not. 2115.
(*l*) *Re Thompson*, Joh. 418. Compare *Re Clough*, L. R. 15 Eq. 284; 3 Not. 291.

40 & 41 Vict. c. 18, § 42.

allowances to all officers and solicitors of the Court in respect to such matters, shall be made,[2] so far as relates to proceedings in England, by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein; and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland, to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the Court.

[1] This is a re-enactment of the provisions of sect. 30 of the Act of 1856, except that the judges to whom the power of making rules is given are not the same.

[2] Though there is an express direction that rules and orders *shall* be made, this has not yet been done; and the rules made under the Act of 1856 have hitherto been acted upon, so far as they are applicable to the practice under the new Act. The provisions of most of these rules are mentioned in the notes to sects. 31, 32, and 33, *ante*, and sect. 49, *infra*.

40 & 41 Vict. c. 18, § 43.

Rules and

43.[1] All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof, if Parliament is then

sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same,[2] and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.[3]

40 & 41 Vict. c. 18, § 43. orders to be laid before Parliament.

[1] This is a re-enactment, with considerable alterations, of sect. 31 of the Act of 1856. That section provided that the rules should be laid before both Houses immediately, or within twenty-one days after the next meeting thereof; and either House might, *mero motu*, rescind any rule by a resolution, passed within thirty-six days, that such rule ought not to continue in force.

[2] Now it will be seen that an address and an Order in Council are necessary to annul any rule. Compare sect. 25 of the Judicature Act, 1875 (*m*), the terms of which are almost identical.

[3] The Act of 1856 contained no saving in favour of intermediate proceedings.

POWERS OF COURT—LANCASTER.

44.[1] The powers vested in the High Court of Justice by this Act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of Court for the purposes aforesaid, so far as relates to proceedings in the said Court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons

40 & 41 Vict. c. 18, § 44. Concurrent jurisdiction of the Court of Chancery of the County Palatine of Lancaster.

(*m*) 38 & 39 Vict. c. 77.

40 & 41 Vict. c. 18, § 44.

authorised under this Act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

[1] This section is new.

POWERS OF COURT—IRELAND.

40 & 41 Vict. c. 18, § 45.

Application for lease or sale in Ireland may be made to Landed Estates Court.

45.[1] It shall and may be lawful for any person who under the provisions of this Act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland,[2] for the purpose of having the lease or sale of such settled estate under the said last-mentioned Court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this Act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the Act of the twenty-first and twenty-second years of Her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be

subject to appeal to the Court of Appeal in Chancery as in other cases under the said Act. 40 & 41 Vict. c. 18, § 45.

[1] This section is new.

[2] The Landed Estates Court is now consolidated with the High Court of Justice in Ireland (*n*), and the former judges thereof are now judges of the Chancery Division; but their peculiar jurisdiction is expressly preserved (*o*).

POWERS OF LEASING—TENANTS FOR LIFE.

40 & 41 Vict. c. 18, § 46. Tenants for life, &c. may grant leases for twenty-one years.

46.[1] It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any[2] life, or for a term of years determinable with any[2] life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland,[3] to take effect in possession at or within one year next after the making thereof;[4] provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and pro-

(*n*) 40 & 41 Vict. c. 57, s. 4. (*o*) *Ibid*, s. 7. See also s. 36.

40 & 41 Vict. c. 18, § 46.

vided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry[5] on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.[6]

[1] This is a re-enactment, with amendments, of sect. 32 of the Act of 1856.

[2] The insertion of the word "any" before "life" confers the same powers upon a tenant *pur autre vie* as upon a tenant for life. It is to be regretted that the same alteration was not made in sect. 32 (*p*).

In a case (*q*) under the Act of 1856, certain estates were settled upon trusts under which the trustees received the whole income in trust to pay two-fifths to the testator's widow, and to apply the remaining three-fifths in payment of expenses incurred in managing the entirety, and to pay the surplus to the widow; and it was held by JESSEL, M. R., that the widow could not grant a valid lease. In a similar case, under the Act of 1877, the trustees would probably be able to do so.

[3] In the Act of 1856, the length of lease authorised for Irish, as well as English, estates was twenty-one years.

[4] The words "at or within one year after the making thereof," are new.

[5] By the Act of 1856 the condition of re-entry was required to be on non-payment of rent for a period *not less than* twenty-eight days, and to extend to breaches of covenant.

[6] See sect. 48.

VALIDITY OF LEASES UNDER SECT. 46.

40 & 41 Vict. c. 18, § 47.

47.[1] Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the

Against whom

(*p*) P. 176, *ante*.

(*q*) *Taylor* v. *Taylor*, L. R. 20 Eq. 297; 2 Not. 2043. Compare also 1 Ch. D. 426, and 3 Ch. D. 145.

same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

40 & 41 Vict. c. 18, § 47. such leases shall be valid.

[1] This section merely consolidates the provisions contained in sect. 33 of the Act of 1856 and sect. 8 of that of 1858.

48.[1] The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

40 & 41 Vict. c. 18, § 48. Evidence of execution of counterpart lease by lessee.

[1] This is a *verbatim* re-enactment of sect. 34 of the Act of 1856. Sect. 35 of the last-mentioned Act merely repealed 32 Hen. VIII., c. 28, and 10 Car. I., sess. 3, c. 6.

INFANTS AND LUNATICS.

49.[1] All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given to guardians on behalf of infants,[2] and by or to committees on behalf of lunatics,[3] and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.[4]

40 & 41 Vict. c. 18, § 49. Provision as to infants, lunatics, &c.

[1] Sect. 36 of the Act of 1856 was as follows:—

"All powers given by this Act, and all applications to the Court under this Act, and consents to such applications, may be exercised,

40 & 41 Vict. c. 18, § 49.

made, or given by guardians on behalf of infants, and by committees on behalf of lunatics, and by assignees of bankrupts or insolvents; Provided nevertheless that in the cases of infant or lunatic tenants-in-tail, no application may be made or given by any guardian or committee, without the special direction of the Court."

[2] Lord HATHERLEY, when Vice-Chancellor, considered that a testamentary guardian came within the words of the Act of 1856, but held that, having regard to the terms of Cons. Ord. XLI., r. 23, and the judge's regulations thereunder, a special guardian must be appointed in chambers to consent on behalf of an infant remainderman (*s*). It had previously been held that a father could not consent on behalf of his infant son, although he had no interest adverse to him (*t*). When an infant petitioner is a married woman, she must be examined pursuant to sect. 50 (*u*).

Infants and lunatics.

[3] The committee of a lunatic must obtain the consent of the Lords Justices under their lunacy jurisdiction, before he can bind the lunatic under this section (*x*). Where a lunatic was merely entitled to an annuity of 200*l.* out of the property, his consent was dispensed with (*y*).

Under the Act of 1856, a guardian or committee was appointed on an *ex parte* summons; and it was laid down by the Judges' Regulations of 8th August, 1857 (*z*) that when an infant was a petitioner the guardian must be appointed before the presentation of the petition. It was, however, subsequently held that these regulation were not obligatory, and that a guardian to a petitioner might be appointed after the presentation of the petition (*a*).

The regulations required the summons to be supported by the following evidence:—

1. The age of the infant. 2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery. 3. Where and under whose care the infant is residing, and at whose expense he is maintained. 4. In what way the proposed guardian is connected with the infant, and why proposed, and how qualified to be appointed. 5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant. 6. The consent

(*s*) *Re James*, L. R. 5 Eq. 334; 2 Not. 662.

(*t*) *Re Caddick*, 7 W. R. 334. Compare *Re Marquis of Salisbury*, 2 Ch. D. 29.

(*u*) *Re Broadwood*, L. R. 7 Ch. 323; 1 Not. 4360.

(*x*) *Re Woodcock*, L. R. 3 Ch. 229; 2 Not. 4229.

(*y*) *Re Turbutt*, 2 N. R. 158.

(*z*) R. 21.

(*a*) *Re Hargreaves*, 5 Jur. N. S. 60; *Re Feegan*, I. R. 8 Eq. 596; *Re Longstaffe*, 8 W. R. 491.

of the guardian to act. 7. The nature of the intended application to the Court.

40 & 41 Vict. c. 18, § 49.

Persons of unsound mind.

The Act of 1856 contained no provision for the case of a person of unsound mind, not so found; and the Act of 1877 does not remedy this defect. It was considered, in 1868, that such a person might consent by a guardian, appointed in the same manner as in the case of an infant (*b*); but in 1873 it was held that the Court had no power to appoint a guardian in such a case (*c*). Where the person of unsound mind is a respondent, the difficulty may now be surmounted by serving a notice under sect. 26 (*d*), on the person of unsound mind, and the persons under whose care he is placed (*e*); but where it is desirable for him to be a petitioner, the only course appears to be to take proceedings in lunacy.

[4] Under the Act of 1856, these directions were obtained by *ex parte* summons (*f*), and it was laid down that the guardian or committee should make an affidavit of his belief that the application was for the benefit of the infant or lunatic, and adduce such other evidence as the case might require to show the propriety of the application, so far as the infant or lunatic was concerned; and the petition was required to be produced (*g*).

MARRIED WOMEN.

40 & 41 Vict. c. 18, § 50.

A married woman applying to the Court, or consenting to be examined apart from her husband.

50.[1] Where a married woman[2] shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined[3] apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement[4] restraining anticipa-

(*b*) *Re Venner*, L. R. 6 Eq. 249; 2 Not. 1114.
(*c*) *Re Clough*, L. R. 15 Eq. 284; 3 Not. 391.
(*d*) *Infra*, p. 181.
(*e*) *Re Crabtree*, L. R. 10 Ch. 203; 2 Not. 2088.
(*f*) Cons. Ord. XLI., r. 23.
(*g*) Reg., 8 Aug., 1857, r. 22.

40 & 41 Vict. c. 18, § 50. Married women.

tion shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

[1] This is a *verbatim* re-enactment of sect. 37 of the Act of 1856.

[2] This section applies to the case of an infant petitioner, who is a married woman (*h*), as well as to married women of full age. See sect. 52, *infra*. But where a female petitioner married between the presentation and hearing of the petition, her examination was dispensed with (*i*). And the separate examination of married women interested in settled estates of which leases were authorised, has been dispensed with in the following cases:—Where the application was clearly for the benefit of all parties, and the married woman was resident in New Zealand (*k*). Where the married woman (petitioner) was entitled to a life estate with a possibility of an absolute interest, and was resident in America (*l*). Where her interest was remote, and was represented by trustees who consented (*m*).

A similar course has been adopted in the case of a sale of estates, in which a married woman who was abroad was interested (*n*).

Examination when taken.

[3] It was, at first, held that when a married woman was a petitioner, her examination must be taken before the presentation of the petition (*o*); but it was subsequently laid down by the Court of Appeal that it ought to be taken after the presentation of the petition (*p*).

Lord HATHERLEY had previously adopted that course, and it has since been held that the examination may be taken at any time before an order is made (*q*). It is now not unusual to take the examination in Court at the hearing (*r*), and in one case it was taken after the order was made, but before it was drawn up, the petition being mentioned again (*s*).

[4] Where a married woman consents to an order, an affidavit of no settlement is not necessary (*t*).

(*h*) *Re Broadwood*, L. R. 7 Ch. 323; 1 Not. 4360.
(*i*) *Re Marshall*, L. R. 15 Eq. 66; 3 Not. 476.
(*k*) *Re Halliday*, L. R. 12 Eq. 199; 2 Not. 4113.
(*l*) *Re Thorne*, 20 W. R. 587.
(*m*) *Re De Tabley*, 11 W. R. 936; 1 Not. 989.
(*n*) *Re Tibbett*, 17 W. R. 394. But see *Re Noyes*, 6 W. R. 7.
(*o*) *Re Brealy*, 24 B. 220; *Re Hadwen*, *ibid.*; *Re Reedley*, 5 W. R. 679.
(*p*) *Re Foster*, 1 De G. & S. 386.
(*q*) *Re Packer*, 39 L. J. Ch. 220; 2 Not. 3084.
(*r*) *Re Taylor*, L. R. 14 Eq. 557.
(*s*) *Re Turbut*, 2 N. R. 487.
(*t*) *Re Standish*, 25 W. R. 8; 4 Not. 604.

MARRIED WOMEN—EXAMINATION, HOW TAKEN.

40 & 41 Vict. c. 18. § 51.

Examination of married woman, how to be made when residing within the jurisdiction of the Court, and how when residing without such jurisdiction.

51.[1] The examination of such married woman when resident within the jurisdiction of the Court to which such application is made, shall be made either by the Court or by some solicitor[2] duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person[3] appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

[1] This section consolidates the provisions of sect. 38 of the Act of 1856 and sect. 6 of the Act of 1858.

[2] The solicitor must be one who actually takes out a certificate in England (*u*), and does not act for the parties to the petition (*x*); but his signature may be attested by the husband's solicitor (*y*).

[3] The Act of 1856 did not provide for the case of a married woman being out of the jurisdiction, and was held not to authorise an examination by a writer to the signet (*z*), a Canadian advocate (*a*), or an English solicitor practising in Paris (*b*).

Since 1858 the British consul at Boulogne has been appointed to take an examination (*c*).

(*u*) *Turner* v. *Turner*, 2 De G. & J. 534; *Re Noyes*, 6 W. R. 7.
(*x*) *Re Brealy*, 5 W. R. 613.
(*y*) *Re Lewis*, 24 W. R. 103; 4 Not. 247.
(*z*) *Re Hooper*, 5 W. R. 670.
(*a*) *Turner* v. *Turner*, 2 De G. & J. 534.
(*b*) *Re Noyes*, 6 W. R. 7.
(*c*) *Re Johnson*, W. N. (1869) 87.

INFANT MARRIED WOMEN.

40 & 41 Vict. c. 18, § 52. As to application by or consent of married women, whether of full age or under age.

52.[1] Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.[2]

[1] This is a *verbatim* re-enactment of sect. 39 of the Act of 1856.

[2] See *Re Broadwood* (*n*), cited under section 50.

GENERAL PROVISIONS.

OPTION TO APPLY, CONSENT, &c.

40 & 41 Vict. c. 18. § 53. No obligation to make or consent to application, &c.

53.[1] Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

[1] This is a *verbatim* re-enactment of sect. 40 of the Act of 1856.

EFFECT OF INCUMBRANCES.

40 & 41 Vict. c. 18, § 54. Tenants for life, &c. to be deemed entitled notwithstanding incumbrances.

54.[1] For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

[1] This is a *verbatim* re-enactment of sect. 41 of the Act of 1856.

(*n*) L. R. 7 Ch. 323; 1 Not. 4360.

PARLIAMENTARY ENTAILS EXCEPTED.

40 & 41 Vict. c. 18, § 55.

Exception as to entails created by Act of Parliament.

55.[1] Provided always, that nothing in this Act shall authorise any sales or lease beyond the term of twenty-one years of any settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry VIII., c. 20, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants-in-tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

[1] This is a re-enactment, with slight verbal amendments, of sect. 42 of the Act of 1856.

SAVING—LORDS OF MANORS.

40 & 41 Vict. c. 18, § 56.

Saving rights of lords of manors.

56.[1] Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

[1] This is a *verbatim* re-enactment of sect. 43 of the Act of 1856.

APPLICATION OF ACT.

40 & 41 Vict. c. 18, § 57.

To what settlements this Act to extend.

57.[1] This Act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this Act as if the matter originated under this Act, or may be continued or taken under the Acts hereby repealed, or partly under this Act and partly under the said repealed Acts as occasion may require: Provided always, that the provisions in this Act contained respecting demises to be made without application to the Court shall extend only to settlements made after the first day of November, 1856.[2]

40 & 41 Vict. c. 18, § 57.

[1] Sect. 44 of the Act of 1856 was as follows: "The provisions of this Act shall extend to all settlements whether made before or after it shall come in force, except those as to demises to be made without an application to the Court, which shall extend only to settlements made after this Act shall come in force."

[2] See sect. 61, *infra*, and note thereto.

REPEAL OF FORMER ACTS.

40 & 41 Vict. c. 18, § 58.

Repeal of Acts specified in schedule.

58. The Acts specified in the schedule to this Act are hereby repealed:[1] Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

[1] The following is the schedule referred to:—

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120 -	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 -	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 -	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 -	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 -	The Settled Estates Act, 1876.

SAVING—STATUTORY POWERS.

40 & 41 Vict. c. 18, § 59.

Saving.

59.[1] Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament[2] not expressly repealed by this Act.

[1] This section is new.

[2] See sect. 17 of 1 Will. IV., c. 65, printed *ante*, p. 161.

EXTENT OF ACT.

40 & 41 Vict. c. 18, § 60.

Extent of Act.

60. This Act shall not extend to Scotland.[1]

[1] The repealed Acts did not extend to Scotland.

COMMENCEMENT OF ACT.

61. This Act shall commence on the first day of November, 1877.[1] 40 & 41 Vict. c. 18, § 61.

[1] The Act of 1856 came into operation on the 1st of November, 1856. Commencement of Act.

LIMITED OWNERS RESERVOIRS AND WATER SUPPLY FURTHER FACILITIES ACT, 1877.

40 & 41 VICT. c. 31.

An Act to give further facilities to Landowners of limited interests in England and Wales and Ireland to charge their estates with the expenses of constructing Reservoirs for the storage of Water, and other similar purposes.

WHEREAS landowners of limited interests in England and Wales, with the approval of the Inclosure Commissioners, and in Ireland of the Commissioners of Public Works in Ireland, are enabled to charge their estates with sums expended by them in constructing reservoirs and other works for the supply of water, if it can be shown to the satisfaction of the said commissioners that such works will effect a permanent yearly increase in the value of such estates for agricultural purposes exceeding the yearly amount proposed to be charged thereon, and are also enabled to charge their estates with sums subscribed for the construction of railways and navigable canals, if it can be shown to the satisfaction of the commissioners that such 40 & 41 Vict. c. 31, Preamble.

40 & 41 Vict. c. 31. Preamble.

railways and canals will effect a permanent yearly increase in the value of such estates for any purpose exceeding the yearly amount proposed to be charged thereon:

And whereas in many places it would greatly conduce to the affording of a plentiful supply of pure water to the inhabitants of villages and towns and to the industrial requirements of the locality, if facilities were given to landowners of limited interests to charge their estates, subject to the approval of the commissioners, with sums expended by them in constructing reservoirs and other works for the supply of water, of a character permanently to increase the value of such estates for other than agricultural purposes, or to be otherwise permanently productive of profit to the owners of the estates, and if such landowners were also enabled to charge their estates with sums subscribed by them for the construction of waterworks on the same terms and conditions as those on which they are now enabled to charge their estates with subscriptions for the construction of railways and canals:

Be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877.

Extent of Act.

2. This Act shall not extend to Scotland.

Act incorporated with 27 & 28 Vict. c. 114.

3. This Act shall be incorporated with the Improvement of Land Act, 1864, and the two Acts shall be read together as one Act.

Certain provisions of 26 & 27 Vict. c. 93 incorporated.

4. The provisions of the Waterworks Clauses Act, 1863, with respect to the security of the reservoirs constructed by the undertakers are incorporated with this Act; and in that Act as incorporated with this Act, the expression "the special Act" shall mean and include the Improvement of Land Act, 1864, and this Act; and the expression

"the undertakers" shall mean any person who constructs or erects any reservoir or dam under the authority of either of the last mentioned Acts. 40 & 41 Vict. c. 31, § 4.

5. The construction or erection of reservoirs or other works of a permanent character for the supply of water to persons residing or engaged in labour on the lands on which such works are situate, or on any other lands settled to the same uses, or for the more convenient or profitable user of such lands, or for the supply of water to any sanitary or other local authority or water company, or to any manufacturer or other person, or for any one or more of such purposes, shall be deemed to be an improvement of land within the meaning of the ninth section of the Improvement of Land Act, 1864, and shall be sanctioned by the commissioners, if it can be shown to their satisfaction that such reservoirs or works for the supply of water will for any purpose effect a permanent yearly increase in the value of the lands on which they are situate, or any other lands settled to the same uses, or will be permanently productive of a yearly revenue to the owner of such lands exceeding the yearly amount proposed to be charged thereon; and the construction of any such works shall be deemed to include the purchase by the landowner of any water right or other easement which might otherwise interfere with or prevent the construction of the same or any such supply of water as aforesaid. 40 & 41 Vict. c. 31, § 5. What to be deemed improvements within 27 & 28 Vict. c. 114.

In calculating whether the improvement is likely to effect a permanent increase of the yearly value of the land, or be productive of a yearly revenue to the landowner exceeding the yearly amount proposed to be charged thereon, it shall be lawful for the commissioners to take into account the value of any contract, the terms of which have been agreed upon between the landowner and any sanitary or other local authority, or water company, or manufacturer, or other persons, for the purpose of supplying such authority, company, person, or persons with water, as well as the effect on such value or revenue of any sum

40 & 41 Vict. c. 31, § 5.

expended by the landowner in the construction of the works over and above the sum proposed to be charged upon the land.

When the improvement will afford a supply of water to persons residing or engaged in labour on the lands on which the proposed works will be situate, or on any other lands settled to the same uses, the commissioners may, if they think fit, sanction the improvement, although it may not be shown that the same will effect a direct yearly increase in the value of the lands, or be productive of a yearly revenue to the owner of the lands exceeding the yearly amount proposed to be charged thereon.

40 & 41 Vict. c. 31, § 6.

Supply of water to local authority, &c.

6. Any landowner charging or proposing to charge his estate with the cost of the construction of reservoirs or other works for the supply of water under this Act may enter into any agreement for the supply of water to any sanitary or other local authority, water company, manufacturer, or other person, for any term not exceeding the number of years during which the cost of the improvement or any part of it is made a charge upon the estate: Provided that every such agreement be approved by the commissioners, and that no premium or benefit in the nature of a premium be reserved thereby by the landowner.

40 & 41 Vict. c. 31, § 7.

Power to contract for execution of reservoirs, &c.

7. Any company now authorised to contract with landowners in England or Wales, or in Ireland, for the execution of any works for the improvement of land, or to make advances for the purpose of executing or assisting in the execution of such works, may, with the approval of the commissioners, contract with any such landowner for the execution of any reservoirs or works of water supply, the cost of which may by this Act be charged upon the estates of such landowner, and may, with the like approval, make advances for the purpose of executing or assisting in the execution of such reservoirs or works; and for this purpose the execution of any such reservoirs or works

shall be deemed to be an improvement of land within the meaning of any Act of Parliament or Articles of Association relating to any such company. 40 & 41 Vict. c. 31, § 7.

8. Any landowner desiring to charge his estates with subscriptions for the construction of waterworks by a water company may charge his estate with such moneys on the same terms and conditions as he may under the Improvement of Land Act, 1864, charge his estates with moneys subscribed for the construction of railways or navigable canals; and for this purpose the provisions contained in sections seventy-eight to eighty-nine, both inclusive, of the Improvement of Land Act, 1864, shall apply, mutatis mutandis, to such subscriptions, as if the same had been subscribed for the construction of a railway or navigable canal. 40 & 41 Vict. c. 31, § 8. Subscriptions to water works.

9. Nothing in this Act shall be construed to authorise any landowner, or any water company, local authority, person or persons authorised by any landowner, to injuriously affect any reservoir, canal, river, stream, or navigation, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, river, stream, or navigation, or in the feeders thereof, or any other water rights or easements in cases where any body of persons or person would if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, canal, river, stream, navigation, feeders, or such supply, quality, or fall of water, or other water rights or easements, unless the landowner, water company, local authority, person, or persons first obtain the consent in writing of the body of persons or person so entitled as aforesaid. 40 & 41 Vict. c. 31, § 9. Protection of rights.

10. In this Act the following words and expressions shall have the following meanings; that is to say, 40 & 41 Vict. c. 31, § 10. Definitions.

"The commissioners" means the Inclosure Commissioners of England and Wales, or the Commissioners of Public Works in Ireland as the case may require:

40 & 41 Vict. c. 31, § 10.

"The Improvement of Land Act, 1864," means the 27th and 28th Vict. c. 114:

"Works for the supply of water" includes wells, pumps, reservoirs, cisterns, ponds, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, machinery, and things for supplying or used in supplying water:

"Water company" means any person or body of persons, corporate or unincorporate, supplying or who may hereafter supply water for his or their own profit:

"Local authority" means any authority having jurisdiction for any public local purpose.

The several words and expressions to which by the Improvement of Land Act, 1864, meanings are assigned, shall in this Act have the same respective meanings as in that Act.

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I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Rolls' Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annexed to the rules, and in many other ways.

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